

International Legal Perspectives on Aspects of Self-Determination in North Kurdistan and Turkey: Kurdish Language Education, and Political Participation

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ABSTRACT

This thesis seeks to analyse how the group right of self-determination and related individual human rights standards interface with selected aspects of the Kurdish Question in Turkey. The aim is to discover to what extent, if at all, certain demands made by the Kurdish movement in Turkey are supported by international law.

Having argued that the right of self-determination does not entail a right of unilateral secession, whether contingent or otherwise, the thesis will focus on how the right could be fulfilled *internally*. It seeks to unpack the various dimensions of *internal* self-determination and to investigate their links with the right to non-discrimination, minority rights, and other selected individual human rights standards.

The thesis will then disaggregate the myriad claims that together make up the Kurdish Question in Turkey. The thesis asks *why* and *in what way* self-determination and associated rights engage with these sub-claims, which involves paying close attention to the historical and contemporary treatment of Turkey's Kurds and to the particular injustices against them that need to be mitigated. To that end, the thesis goes on to consider two of the most important aspects of the Kurdish Question in Turkey, namely the demand for mother tongue education and the demand for political participation at both the national and local levels. In terms of the former, it is argued that the right of self-determination and associated individual human rights standards offer strong normative support to the demand for Kurdish mother tongue education. In terms of political participation at the national level, it is argued that the existing obstacles to "pro-Kurdish" representation in the national parliament ought to be removed because some of them are straightforwardly in violation of human rights law while others hamper its full realisation. In terms of political participation at the local level via territorial autonomy it is argued that such an institutional arrangement would, in this particular instance, be a valuable way of implementing the right of self-determination and fulfilling minority rights. Both of these rights categories add weight to the Kurdish demand for territorial autonomy.

As well as engaging in the abovementioned legal analysis, the thesis presents several models from other countries which might be capable of accommodating the claims to mother tongue education and territorial autonomy in Turkey in order to link-up the human rights framework with existing self-determination practices.

The thesis will conclude by reflecting on the *usefulness* of the normative support offered by international law to these aspects of the Kurdish Question. It will be argued that the ability to claim the support of international human rights law adds something valuable to the ideological armory of the Kurdish movement in Turkey.

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Introduction

The Kurdish people, it is often remarked, are one of the largest ethnic groups in the world without a state of their own. Numbering somewhere in the region of 30 million and divided between Turkey, Syria, Iraq and Iran, earnest and often violent attempts have been made to assimilate them into the dominant nations of those four states. In Turkey, this has involved—among other things—outlawing the Kurdish language, outlawing manifestations of Kurdish culture, excluding Kurdish parties from the national political debate, economically under-developing the Kurdish regions and, for a considerable period of time, denying the very *existence* of Kurds. The ongoing attempt to erase Kurdishness from the cultural and political landscape led to the creation of the Kurdistan Workers Party (PKK), a violent insurgency, and repeated states of emergency that have claimed tens of thousands of mostly Kurdish lives, and which continue to tear apart the democratic potentialities of the state.

The Kurdish Question is, at present, a question of how to accommodate two competing nationalisms with different (but overlapping) cultures and languages within the framework of a single Turkish state, the boundaries and sovereignty of which are recognised by international law. It is, in other words, a question of self-determination which was denied to the Kurds in the form of independent statehood—a historical and ongoing wrong that gave rise to terrible consequences. As the renowned international law scholar Richard Falk puts it, the situation of the Kurds in Turkey is one in which “the legal and political ideal of territorial unity causes moral havoc and social, economic, and cultural injustice resulting in great suffering and endless strife for these entrapped peoples.”¹

This thesis engages with the international legal right of peoples to self-determination and with the penumbra of human rights that surround it. The overall aim is to establish a doctrinal and theoretical account of the right of self-determination and to consider how it interfaces with two of the most pressing aspects of the Kurdish Question in Turkey, namely the claim to Kurdish mother tongue education and the claim to political participation at the national and the local levels. In doing so, this thesis will explore a number of existing self-determination arrangements from other countries in an effort to identify broad models that might be capable

¹ Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge 2000) 102.

of accommodating these self-determination claims in Turkey. In other words, this thesis will link-up the self-determination framework with concrete models of accommodation. The thesis seeks to answer the question: *how do the right of self-determination and related human rights standards engage with selected aspects of the Kurdish Question in Turkey?*

The right of self-determination is contained in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as well as in customary international law. Its status as a *jus cogens* norm is widely acknowledged.² It has also been recognised by the International Court of Justice as an *erga omnes* norm.³ Typical accounts of self-determination in scholarly literature and in political strategy tend to fixate on whether or not the group claiming the right is entitled to it as a qualifying “people” and whether or not they have an absolute or qualified right to an overarching self-determination outcome such as independent statehood or territorial autonomy. Such approaches typically under-emphasise the specific contours of self-determination claims and *why* international law ought to engage with them. Without necessarily doubting the value of that approach, this thesis instead seeks to disaggregate two of the most important sub-claims inherent in the Kurdish Question in Turkey and to examine how they cut across a number of human rights categories.

Part I consists of historical reflections on the origins of the Kurdish Question in Turkey (Chapter One) and the development of the right of self-determination (Chapter Two). These historical reflections will set the stage for the rest of the thesis and will ground claims about the contemporary meaning of self-determination in its concrete historical development. Part II conceptualises the contemporary group right of self-determination in both its external (Chapter Three) and internal (Chapter Four) aspects. In essence, the argument is that external self-determination, understood narrowly as a right to elect to become an independent state, applies only in a very narrow and historically specific set of circumstances—particularly in the context of decolonisation. Internal self-determination, on the other hand, has ongoing relevance to sub-state ethnocultural groups such as Turkey’s Kurds and is capable of engaging productively with their claims, alongside other individual human rights standards. Part III goes on to link-up the self-determination framework established in Part II with two core aspects of the Kurdish

² International Law Commission, *Fourth report on peremptory norms of general international law (jus cogens)* by Dire Tladi, *Special Rapporteur* (2019), UN Doc. A/CN.4/727, para. 108.

³ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995 90, para. 29.

Question in Turkey. Chapter Five argues that the right of self-determination, in combination with certain individual rights, provides strong normative support to Kurdish claims to be educated in their mother tongue. It also considers two possible self-determination models—one based on non-territorial autonomy and the other based on territorial autonomy—that might be capable of effectively accommodating the claim. Chapters Six and Seven engage with two different but related aspects of Kurdish political participation. Chapter Six is concerned with political participation at the national level, particularly through the medium of “pro-Kurdish” political parties. It argues that some of the mechanisms adopted by Turkey to keep these parties off the national political scene are unlawful, and that there are strong normative grounds for demanding the removal or reform of others. In doing so, Chapter Six theorises the importance of minority rights-based political parties to the right of self-determination. Chapter Seven engages with the most far-reaching aspect of the Kurdish Question, namely the claim to political participation via some kind of territorial autonomy. The chapter elaborates upon the kind of territorial autonomy envisaged by the Kurdish movement in Turkey (which is built around the theories and proposals of the leader of the PKK, Abdullah Öcalan) and concludes that, given its revolutionary nature, it is likely to entail a struggle *against* international law. The chapter also argues that more mainstream forms of territorial autonomy in Turkey derive strong normative support from the right of self-determination and considers a model that might be best capable of accommodating that claim. In essence, this chapter is based on the understanding that international law is—at least to some extent—in tune with minority demands for *identity* recognition, but it is simultaneously hostile to demands for the revolutionary *redistribution* of global wealth.

The thesis will conclude that the right of self-determination in its internal dimensions, alongside certain interlocking individual human rights standards, engages—on the whole—positively with the claims to Kurdish mother tongue education and political participation nationally. It also offers qualified support to the claim for political participation locally, in the form of territorial autonomy. This positive engagement is based on the specificity of the Kurdish claim and the historical and contemporary circumstances in which they find themselves. By effectively linking these aspects of the Kurdish claim to the normative universe of international law, the right of self-determination provides Turkey’s Kurdish movement with ideological weaponry and armory with which to conduct its ongoing struggle for emancipation. The claim here is not that international human rights law is a magic bullet that promises to resolve the Kurdish Question *from the outside*, but that the prevalent and influential language

of human rights law has the ability to legitimise the Kurdish claims discussed in this thesis, and this legitimation can and does add considerable weight and power to those claims where they are made *from the inside*.

Methodology

This thesis adopts a qualitative, desk-based research methodology. It consists of a mixture of doctrinal and descriptive work. It is doctrinal in the sense that “the researcher’s principal...aim is to describe a body of law and how it applies”⁴ and it is qualitative insofar as it recognises that law is reasoned and not found⁵; an observation that is markedly true of international legal methodology, given public international law’s decentralised and primitive character.⁶ In terms of legal interpretation, the author attempts to adopt a middle-point between strict positivism and utopianism⁷. By “strict positivism” one refers to the idea that:

“Law is regarded as a unified system of rules that...emanate from state will. This system of rules is an “objective” reality and needs to be distinguished from law “as it should be”. Classic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g. arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis; there is only hard law, no soft law.”⁸

By “utopianism” one refers to the idea that international legal rules are so open-ended that they can be cynically instrumentalised to support the author’s moral and political commitments. Instead, the doctrinal analysis in this thesis relies upon orthodox sources of international law as listed in article 38 of the Statute of the International Court of Justice, and the orthodox approach to legal interpretation contained (in the case of treaties) in articles 31 to 33 of the Vienna Convention on the Law of Treaties. It also engages with relevant aspects of judicial and treaty body discourse at both the regional and international levels. But at the same time, it recognises the core features of international human rights instruments—particularly the fact that one is generally justified in taking a teleological approach to their interpretation and that they tend to be “dynamic and evolutive”.⁹ This author has therefore

⁴ Ian Dobinson & Francis Johns, ‘Qualitative Legal Research’ in Mike McConville & Wing Hong (eds.), *Research Methods for Law* (EUP, 2007), p. 19.

⁵ *Ibid.*, p. 22.

⁶ Stephen Hall, ‘Researching International Law’ in Mike McConville & Wing Hong (eds.), *Research Methods for Law* (EUP, 2007)

⁷ See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2006).

⁸ Steven Ratner & Anne-Marie Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ 93(2) *The American Journal of International Law* (1999), p. 304.

⁹ Martin Scheinin, ‘The art and science of interpretation in international human rights law’ in Bård Andreassen, Hans-Otto Sano & Siobhán McInerney-Lankford (eds.), *Research Methods in Human Rights: A Handbook* (Elgar, 2017).

sought to weave together typically formal methods of legal interpretation (treaty exegesis, evidence of state practice and *opinio juris*, and scholarly opinion) with “soft law” interpretations of relevant norms and an exploration of their historical development. Where legal norms are indeterminate, one has sought to colour those norms with an interpretation that is both useful to subaltern groups and plausible.

There are, however, limits to this teleological and dynamic approach to legal interpretation. To that end, this thesis occasionally adopts the concept of *normative force* to describe the capacity of human rights norms to legitimise certain claims made by minority groups. This *normative force* derives not from a clear legal requirement which is built into the particular human right but from the ability of particular rights to act as a bridge between a minority claim and the “normative universe” of international law.¹⁰ Inherent in this concept of *normative force* is the claim that the power (or force) of human rights—particularly in terms of their ability to galvanize change and empower subaltern groups—extends beyond their baseline legal requirements. For example (and as this thesis will later argue), there might not be a clear legal right to mother tongue education, but the right of children to a good standard of education and the right of minority groups to maintain and develop their culture would both be more effectively fulfilled with the provision of mother tongue education. Those rights therefore add *normative force* to the claim for mother tongue education.

Both the interpretation of certain human rights norms and the application of them to the Kurdish Question in Turkey involve a certain amount of inter-disciplinarity, as history, politics, and the sociology of language all intersect. Furthermore, the thesis considers a number of case-studies which are intended to demonstrate how the abstract human rights framework might be translated into practical arrangements to accommodate Kurdish claims. Justifications are given for adopting the particular case-studies later in the thesis.

Finally, it is necessary to write a few words in justification of the choice to focus on the Kurds in Turkey. It is submitted that the core features of the Kurdish Question in Turkey make it a useful foil for exploring the ability of the currently existing human rights framework to effectively interface with complex minority group issues. These core features include the fact that Turkey’s Kurds are dispersed across the state’s territory *and* territorially

¹⁰ Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008), 220

concentrated in the southeast, and the fact that they make-up some 20 per cent of the overall population. Much has been written about the self-determination struggle of the Palestinians but, to this author's knowledge, little has been written about the struggle of the neighbouring Kurds. This thesis focuses only on the Kurds in Turkey, mainly because the Kurds in Iraq already benefit from a far-reaching form of federalism, the literature on the Kurds in Iran is insufficient to ground a desk-based study, and the violent situation in Syria is too dynamic. Moreover, it is more feasible to obtain reliable literature in English pertaining to the situation in Turkey, given its close relationship with the European Union and its founding membership of the Council of Europe.

The thesis proceeds thematically. Having conceptualised the right of self-determination against the background of its historical development, Section III considers three overlapping themes, namely mother tongue education, political participation, and territorial autonomy.

PART I

HISTORICAL REFLECTIONS

CHAPTER ONE

1 From Millets to Minorities: The Origins of the Kurdish Question

1.1 Who are the Kurds?

It is often remarked that the Kurds are the largest stateless nation in the world, though it is impossible to obtain accurate census figures describing their numbers and geographical spread.¹ One problem stems from the fact that the governments of their host countries have tended to minimise the size of their Kurdish populations while Kurdish nationalist sources tend to inflate them.² A recent estimate suggests that there are more than 15 million Kurds in Turkey (20 per cent of the population); 4.7 million in Iraq (25 per cent of the population); 7 million in Iran (15 per cent of the population); more than 1 million in Syria (9 per cent of the population); 75,000 in Armenia (1.8 per cent of the population); and 200,000 in Azerbaijan (2.8 per cent of the population).³ Other estimates are more conservative, suggesting that there are 25 million Kurds spread across the regions bordering Iran, Iraq, Turkey and Syria.⁴ For ease of reference, the term “Kurdistan” will be used to describe those parts of Turkey, Iraq, Syria, and Iran that are densely and historically populated by Kurds. The term “North Kurdistan” refers to the Kurdistan region of Turkey (in Kurdish “Bakur”). Estimates suggest that the total area of Kurdistan is 595,700 km, roughly equal to the size of France.⁵

Diversity is a key feature of Kurdishness. This diverse makeup was given an early (and orientalist) illustration by Mark Sykes, the British diplomat who represented Great Britain in the secret Sykes-Picot negotiations during the course of World War I. Having traversed 7,500 miles of Kurdistan he reported that they were a tribal people divided by natural barriers (including lakes and mountains), which meant that some Kurdish tribes “are completely cut off from the others...and have little or nothing in common with them”.⁶ This lack of physical unity

¹ Incidentally, the Amazigh people of North Africa might outnumber the Kurds. See Bruce Maddy-Weitzman, *The Berber Identity Movement and the Challenge to North African States* (University of Texas 2011).

² David L. Phillips, *The Kurdish Spring: A New Map of the Middle East*, (Transaction Publishers 2015), xviii.

³ Kerim Yildiz, *The Future of Kurdistan: The Iraqi Dilemma* (Pluto Press 2012), 7.

⁴ Gareth Stansfield, *Iraq: People, History, Politics (Hot Spots in Global Politics Series)* (Polity Press 2007), 64.

⁵ David L. Phillips, *supra* n. 2, xx.

⁶ Mark Sykes, ‘The Kurdish Tribes of the Ottoman Empire’ 38 *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* (1908) 451, 463.

in Kurdistan has contributed to the diverse nature of the Kurdish language, which consists of several different dialects. Kurmanji predominates in Turkish and Syrian Kurdistan, while Sorani is widely spoken in Iraqi Kurdistan and Iranian Kurdistan with several other Kurdish dialects in between. There are no strict boundaries between the various dialects.⁷ Grammatically, the two major dialects (Kurmanji and Sorani) differ from each other on roughly the same scale as English and German, but vocabulary differences are roughly of the same order as Dutch and German.⁸

Kurds are also religiously diverse. Roughly two-thirds of Kurds are Sunni Muslims, mostly of the Shafi'i *mazhab* (school of Islamic jurisprudence).⁹ Their adherence to this particular school of thought distinguishes them from the Sunni Turks and Arabs (who generally follow the Hanafi *mazhab*). Southern parts of Kurdistan, including Kirmanshah in Iran and Khanaqin and Mandali in Iraq, are mostly Shiite.¹⁰ The Faylis in Baghdad are Arabophone Shiites, but they consider themselves Kurds.¹¹ Kurdish Alevi can be found on the North-western edge of Kurdistan and might number more than one million.¹² There are also some Jewish Kurds, but most of them have migrated to Israel.¹³

Perhaps the earliest written reference to the Kurds comes in the form of Xenophon's account of the Greek retreat from the Persians in the fourth century BC.¹⁴ Xenophon noted that he and his men were harassed by "Kardouchoi" people who "dwelt among the mountains... a warlike people... not subjects of the king".¹⁵ Most of the academic literature supports the view that they are almost certainly an amalgam of Indo-European tribes that made their way through the region at different times.¹⁶ Their belief that they are the direct descendants of the ancient

⁷ Martin Van Bruinessen, *Agha, Shaikh and State: The Social and Political Structures of Kurdistan* (Zed Books 1992), 21-22.

⁸ David McDowall, *A Modern History of the Kurds* (3rd edition) (I.B. Tauris 2014), 9.

⁹ Martin Van Bruinessen, 'Religion in Kurdistan' in Martin Van Bruinessen, *Mullas, Sufis and Heretics: The Role of Religion in Kurdish Society: Collected Articles* (The Isis Press 2000), 2-3.

¹⁰ *Ibid.*, 3.

¹¹ *Ibid.*

¹² *Ibid.*, 4.

¹³ *Ibid.*, 5.

¹⁴ Wadie Jwaideh, *The Kurdish National Movement: Its Origins and Development* (Syracuse University Press 2006), 11.

¹⁵ Christopher Hitchens, *The Struggle of the Kurds* in Christopher Hitchens, *Love, Poverty and War: Journeys and Essays* (Atlantic Books 2005), 352.

¹⁶ David McDowall, *supra* n. 8, 9.

Medes, who once established an empire in the Zagros Mountains¹⁷, is one of the unverifiable myths used to support their claims to a unique heritage.

Any attempt to provide a definitive answer to the question *who are the Kurds?* runs into quite substantial problems due to their heterogeneity: a feature that attaches to other ethnic groups too, and has something to do with trying to fit diverse, fluid and overlapping human identities into a neat definitional box. The continued existence of these differences might be further explained by recourse to the argument expounded by Vali: “Identity, national or otherwise, always presupposes difference and is inconceivable without it. Identity is a relationship of the self and the other in difference; it always entails the trace of the other and is ever haunted by it”.¹⁸ A diverse range of “others” haunts the Kurds, and Kurdish identity bears the mark of this diversity. Perhaps more fundamentally, the history of most nation-states indicates that unifying identities, standardized languages, and the levelling of differences tend to develop *after* the nation-state form has been established, and the process is carried out via a mixture of coercion and consent. For the rulers of the nation-state, forging a single unifying identity gives it legitimacy and makes acceptance of its actions “in the interests of the nation” more likely, irrespective of class, gender, and ethnic divides.¹⁹ Since there has never been a Kurdish state to actively forge the unifying accoutrements of a single Kurdish national identity—such as a standardised written language—it is not surprising to find substantial heterogeneity among them.

There are, however, certain cultural practices and shared traditions that bind the Kurds together. One might point to the annual Newroz festival celebrated by Kurds everywhere (a festival that is also part of other cultures, such as Persian), the shared experience of perpetual oppression and rebellion, and the traditional Kurdish clothing (*shal-u-shapik*) which is a frequent sight throughout Kurdistan, as manifestations of a unifying Kurdish identity. The Kurdish language is perhaps the main carrier of Kurdish culture and identity—it is both a marker of difference and a carrier of difference. This is not to say that one can draw sharp distinctions between Kurds and other Middle Eastern ethnic groups—Kurds, Arabs, Turks, Persians and others have many things in common. Probably more in common than that which divides them.

¹⁷ Gareth Stansfield, *supra* n. 4, 64.

¹⁸ Abbas Vali, ‘The Kurds and Their “Others”: Fragmented Identity and Fragmented Politics’ 18 *Comparative Studies of South Asia, Africa and the Middle East* (1998), 83.

¹⁹ David Harvey, ‘Nation State – God on Earth?’ in *Challenging Capitalist Modernity II: Dissecting Capitalist Modernity – Building Democratic Confederalism* (International Initiative Edition 2015), 51.

One might also make the obvious point that the Kurds inhabit a physically contiguous territory (although many Kurds in Turkey, for example, live in Istanbul and there is a sizeable Kurdish diaspora) and they often form a unified front in the face of common threats. All of this demonstrates two things: First, that ethno-cultural identity is a fairly malleable concept. Second, that the existence of a diverse Kurdish ethno-cultural identity is a fact.

As will become apparent, the lack of unifying Kurdish characteristics had a substantial impact on the slow development of Kurdish nationalism, which only began to evolve in the dying days of the Ottoman Empire, and only became a potent force when Kurdistan was divided after World War I.

1.2 'Minorities' and the Kurds under the Ottoman Empire

The overall structure of the Ottoman Empire was that of a pre-modern state which was yet to adopt centralized nation-state ideas.²⁰ Erik Zürcher identifies three crucial differences between the eighteenth-century French State and the eighteenth-century Ottoman Empire. First, the Ottoman Empire was very small in both an absolute and relative sense (though not in a geographical sense). The central government employed between 1000 and 1500 clerks and no more than three per cent of the national product went to the central government in taxes, which meant that the Ottoman treasury only received between one-tenth and one-sixth of the French treasury.²¹ Partly as a result of the empire's decentralized structure, it was unable to compete economically with the French nation-state, which meant that it struggled to afford the tools of central control, such as an advanced army and an effective bureaucracy.²² Second, the Empire lacked the resources to deal directly with its citizens, which meant that the individual was subordinate to the group to which he or she belonged.²³ Third, the Empire did not recognise the concept of equality before the law.²⁴ Instead, there was a tacit contract between the Ottoman sultan and his people that was based on the belief that the state existed to protect and defend

²⁰ Erik J. Zürcher, *Turkey: A Modern History* (I.B. Tauris 2001), 14.

²¹ *Ibid*, 13.

²² *Ibid*, 39.

²³ *Ibid*, 14.

²⁴ *Ibid*.

the Islamic order.²⁵ Non-Muslim Ottomans were forced to pay a religious tax (*ciziy*e) and live as second-class citizens.²⁶ Non-Muslim communities were, however, granted a measure of autonomy over their own affairs under the *millet* system. According to Aral, these policies were not intended to assimilate non-Muslim religious communities, rather they were intended to allow religious minorities to “communicate in their own language, to regulate their civic matters according to their own (mostly religious) law, to enjoy freedom of religion and conscience, the right to set up foundations, and to arrange for their own education”.²⁷ Essentially, the *millet* system consisted of ad-hoc arrangements with the heads of religious communities to allow tangible autonomy in certain matters on a non-territorial basis.²⁸ As Barkey and Gavrilis explain, “it enabled the Ottoman state to categorize its religious groups into culturally autonomous and self-regulating communities with religious leaders acting as the intermediaries between state and community”.²⁹

The *millet* system institutionalized and built upon earlier, pre-Ottoman, methods of ruling non-Muslim communities (for a large part of their histories, Islamic caliphates ruled over mostly non-Muslim populations³⁰). While the *millet* system could be described as a form of minority rights protection *avant la lettre*, it is important to bear in mind that *ethno-cultural* differences were not, at that time, of political importance. Since the Empire derived its legitimacy, in large part and for most of its history, from religion rather than a claim to represent a particular people or nation, it did not matter whether the ruler shared the language or ethnicity of the ruled.³¹ The majority of Syria’s population, for example, spoke Arabic, but that fact was largely politically inconsequential.³² Although Kurdish principalities were often repressed by Ottoman authorities, there were no direct threats to Kurdish identity and no attempts to Turkify them.³³ Indeed, as White highlights, it was the evolution of the Ottoman communities into nations that

²⁵ Berdal Aral, ‘The Idea of Human Rights as Perceived in the Ottoman Empire’ 26 *Human Rights Quarterly* (2004) 454, 471.

²⁶ Erik Zürcher, *supra* n. 20, 10.

²⁷ Berdal Aral, *supra* n. 25, 475.

²⁸ Karen Barkey and George Gavrilis, ‘The Ottoman Millet System: Non-Territorial Autonomy and its Contemporary Legacy’, 15 *Ethnopolitics* (2016) 24.

²⁹ *Ibid*, 26.

³⁰ Albert Hourani, *A History of the Arab Peoples* (Faber and Faber 1991).

³¹ Benjamin White, *The Emergence of Minorities in the Middle East: The Politics of Community in French Mandate Syria* (Edinburgh University Press 2011), ch 1.

³² Nikolaos Van Dam, *The Struggle for Power in Syria: Politics and Society Under Asad and the Ba’th Party* (IB Tauris 2011), 2.

³³ Jordi Tejel, *Syria’s Kurds: History, Politics and Society* (Routledge 2009), 16.

coincided with the evolution of minorities: a development that he describes as a ‘traumatic epistemological transformation...’.³⁴

As explained above, the Kurds are a mostly Muslim people, so they did not benefit from the *millet* system. However, substantial Kurdish autonomy came after the battle of Chaldiran in A.D. 1514 when the Ottoman Empire successfully took a large part of Kurdistan from the Persian Safavid Empire and thereby perpetuated the division of Kurdistan between two powerful enemies.³⁵ Having successfully checked Safavid power, the Ottomans proceeded to put Kurdish tribal rulers in charge of securing the line between the two great powers. The governing principle behind this arrangement was that “where Kurdish tribes maintained good order, provided troops when necessary, defended the border regions and above all acknowledged Ottoman suzerainty, they would be allowed a measure of freedom enjoyed virtually nowhere else in the empire”³⁶. It should not be supposed that Kurdish autonomy was the gift of a beneficent empire, since it had more to do with the inability of the pre-modern Ottoman sultans to extend central control to the outer boundaries of the empire. Nor should it be supposed that the substance of Kurdish autonomy remained static and unchanged for several centuries. Ever since the conclusion of the Treaty of Zuhab in 1639 and the consequent settling of the frontier between the Ottoman and Persian Empires, attempts were made to regain central control over Kurdistan. These attempts were occasionally relaxed as other supposed threats to the Ottoman frontiers arose, such as an expansionist Russia and rebellious Armenians. It should also be noted that Ottoman Kurdish autonomy was not a single, unified territorial regime similar to the modern Kurdistan Region of Iraq. It was instead a complex array of emirates ruled by *mirs* and tribal leaders. Some inaccessible parts of Kurdistan were left more-or-less completely autonomous while others were expected to pay taxes to the state treasury. The amount of independence enjoyed by these emirates varied as central authority waxed and waned.³⁷ When it waned, some emirates would refuse to pay tribute or send military assistance, and this is what is usually meant by Kurdish “rebellion” in this period.³⁸

³⁴ Benjamin White, ‘The Nation-State Form and the Emergence of ‘Minorities’ in Syria’ 7 *Studies in Ethnicity and Nationalism* (2007) 64.

³⁵ Wadie Jwaideh, *supra* n. 14, 17.

³⁶ David McDowall, *supra* n. 8, 29.

³⁷ Martin Van Bruinessen, *supra* n. 7, ch. 3

³⁸ *Ibid*, 159.

Historical scholarship strongly suggests that notwithstanding the fifty Kurdish rebellions against the Ottoman Empire during the imperial period³⁹ (which were, as mentioned above, largely tribal rather than nationalistic affairs), Kurdish leaders considered themselves part of the Muslim *ummah* rather than a separate nation. Indeed, the very concepts of nation and minority would have been alien to them.

1.3 *The instrumentalisation of Ottoman communities*

The period of Ottoman history leading up to the *tanzimat* (reorganisation) reforms in 1839 helps to establish some links between the external state interference for the protection of particular communities and the emergence of those communities as “marked citizens”. As European states and Russia began to assume greater dominance over world affairs, a certain pattern emerged which, according to Zürcher, was always more or less the same. The discontent of certain, mostly Christian, communities within the empire evolved into insurrections, partly caused by bad governance and partly by the spreading influence of nationalism. One of the powers would then intervene diplomatically or militarily in order to defend the local Christians with the end result of the Ottoman government losing control over that part of the empire.⁴⁰ Historians generally agree that many of these revolts were catalysed or provoked by outside powers, with Russia considering itself the protector of Orthodox Christians while Britain and France claimed the same role for Protestants and Catholics.⁴¹ For example, a peace treaty signed by the Ottomans and the Russians after the war over the strategically vital northern shores of the Black Sea in 1768-74 recognised the independence of the Crimea and ascribed to the Russian empress the right to protect an Orthodox Church in Istanbul. This was interpreted by the Russians as a right to protect the Orthodox Church throughout Ottoman lands and led to Russian consuls being appointed throughout the Balkans and the extension of Russian citizenship to the local Christians⁴². Again, in the early 19th century, Russia played a crucial role in the Greek revolt against Ottoman rule that had nothing to do with the autocratic empire’s love of freedom and much to do with its desire to win

³⁹ Maya Arakon, ‘Kurds at the Transition from the Ottoman Empire to the Turkish Republic’ 13 *Turkish Policy Quarterly* (2014) 139, 142.

⁴⁰ Erik Zürcher, *supra* n. 20, 55.

⁴¹ Berdal Aral, *supra* n. 25, 479.

⁴² Erik Zürcher, *supra* n. 14, at p. 19.

influence in the Balkans at the expense of the Ottoman Empire.⁴³ Moreover, the system of Ottoman Capitulations, which began as *privileges* (granted to Western states) providing non-Muslim residents with certain economic and juridical privileges, developed into extensive *rights* held exclusively by “the Empire’s steadily growing non-Muslim proto-bourgeoisie”.⁴⁴ These rights transformed the Ottoman Empire into “a virtual open and free market for Europe”.⁴⁵ This, rather unsurprisingly, led to “resentment within the Turkish-Muslim ruling elite, which reacted by cultivating an increasingly chauvinistic national consciousness of its own”.⁴⁶ Space precludes a full examination of this dynamic, but the key point for present purposes is that the Kurds were not immune from it. Their reputation as a fiercely independent people meant that they were also susceptible to imperial designs, so that when the time came to rescue what was left of the Ottoman Empire after World War I, minorities—whether religious or ethnic—were seen as a threat to the territorial integrity and national development of the new Turkish Republic. Levene argues that this dynamic of Great Power interference in the Ottoman Empire contributed to the formation of a “zone of genocide” in eastern Anatolia towards the end of the 19th century.⁴⁷ Focusing on the Armenian genocide of 1915, he argues “it was intended as a signal to *all* the Great Powers that the sort of interference that had characterized their behaviour towards the Ottoman Empire in the past, would not be tolerated in the future”.⁴⁸ Although the Kurds did not share the terrible fate of the Armenians, the attempt to forge a homogenous nation-state meant that they were subjected to a process of forced Turkification through tactics such as splitting-up Kurdish tribes and resettling them in Turkish areas.⁴⁹ The basic aim was to destroy the Kurds’ identity and assimilate them into the ethnic Turkish nation.

The conceptual deployment a kind of humanitarian intervention in defence of small communities, and their instrumentalisation as a means of extracting capital from a weakened Ottoman Empire, thus contributed to a situation whereby minorities came to be seen as an

⁴³ Berdal Aral, *supra* n. 25, 479-480.

⁴⁴ Umut Özsü, ‘De-territorializing and Re-territorializing *Lotus*: Sovereignty and Systematicity as Dialectical Nation-Building in Early Republican Turkey’ 22 *Leiden Journal of International Law* (2009) 29, 38.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Mark Levene, ‘Creating a Modern “Zone of Genocide”: The Impact of Nation- and State Formation on Eastern Anatolia, 1878-1923’ 12 *Holocaust and Genocide Studies* (1998) 393.

⁴⁸ *Ibid.*, 408.

⁴⁹ Serhat Bozkurt, ‘The Kurds and Settlement Policies from the Late Ottoman Empire to Early Republican Turkey: Continuities and Discontinuities (1916-34)’ 47 *Iranian Studies* (2014) 823.

existential threat to the Turkish state and helped to bring into existence a policy of extermination and assimilation. In this regard, Bayir notes that in the early republican period “unity was conceived of as ‘oneness in every aspect of life’, and diversity was conceptualised as ‘separatism’, which was prohibited, and also criminalised”.⁵⁰ Furthermore, “Due to the negative memories of the past, [minorities] were regarded as untrustworthy, ‘foreign’ subjects, and a danger to the state”.⁵¹

The point here is that Turkey’s potent nationalism (key features of which will be explored in more depth in later chapters) did not emerge from a historical vacuum. It was not merely an abstract idea that was put into practice by ruling ideologues. Rather, the contours of Turkish nationalism after the collapse of the Ottoman Empire were shaped by the experiences of foreign intervention and the spread of other nationalisms among Ottoman communities. This helps to explain why Turkish nationalism has taken-on a paranoid, ethnocentric, and religious quality.

1.4 The Tanzimat, the Young Turks, and the emergence of Kurdish nationalism

The period immediately after the French Revolution heralded the start of centralization reforms in the Ottoman Empire. The ideas of the French Revolution had a marked effect on the relatively literate Christian communities of the Ottoman Empire, as evidenced by the Serbian insurrection aimed at independence in 1808⁵². Zürcher notes that nationalism was introduced into parts of the Ottoman Empire in the aftermath of the revolutionary wars⁵³, which led Sultan Mahmut II to introduce reforms aimed at centralizing power. These centralisation efforts culminated in the *tanzimat* reforms in 1839-71 and the eventual demise of the autonomous Kurdish emirates in 1850⁵⁴. The latter outcome was partly a result of British pressure on the Ottoman Empire in order to secure its continued existence as a bulwark against Russian expansion towards the Mediterranean, threatening British interests⁵⁵.

⁵⁰ Derya Bayir, *Minorities and Nationalism in Turkish Law* (Ashgate 2013), 96.

⁵¹ *Ibid*, 121.

⁵² Erik Zürcher, *supra* n. 20, 26.

⁵³ *Ibid*

⁵⁴ David McDowall, *supra* n. 8, 47.

⁵⁵ Michael Eppel, ‘The Demise of the Kurdish Emirates: The Impact of Ottoman Reforms and International Relations on Kurdistan during the First Half of the Nineteenth Century’ (2008) 44 *Middle Eastern Studies* 237, 255.

In November 1839 an imperial edict written by foreign minister Resit Pasha and promulgated in the name of the sultan promised four basic reforms: guarantees for the life, honour and property of the sultan's subjects; an orderly system of taxation; a system of conscription for the army; and equality before the law of all subjects, whatever their religion⁵⁶. In 1843 a new penal code was introduced which recognised the equality of Muslims and non-Muslims⁵⁷. The *millet* system was displaced by the concept of Ottoman citizenship as the basis for the relationship between the state and its subjects, and the modern idea that human rights are necessary in order to control the overweening power of the centralized nation-state began to take hold.

The demise of the Kurdish emirates had a marked effect on the evolution of Kurdish nationalism. For many, Shaykh Ubayd Allah, who invaded Persia in 1880 claiming that 'the Kurdish nation... is a people apart'⁵⁸, is the first great Kurdish nationalist; but it is not until the Young Turk revolution and the second constitutional period beginning in 1908 that the first Kurdish political society (Society for the Rise and Progress of Kurdistan) was founded in Istanbul.⁵⁹ By this time, the slow rise of Kurdish nationalism was largely a by-product of the rise of Turkish nationalism and Armenian nationalism, and as Jwaideh notes 'the task of propagating a forbidden and unfamiliar idea among an overwhelmingly illiterate people with ill-defined [tribal] loyalties was not an easy one'⁶⁰, even though the slow demise of the Ottoman Empire was, unsurprisingly, causing Kurdish leaders to seriously consider their own national future. Kurdish nationalism was slow in taking root in large part because the demise of the autonomous Kurdish emirates strangled the growth of the bourgeoisie and fettered the growth of Kurdish literature and language. What remained of the Kurdish bourgeoisie was concentrated in western Anatolia, far from Kurdistan, which meant that 'the intellectual forebears of Kurdish nationalism did not enjoy the social and political conditions under which the Kurdish national idea could have taken root and developed into a powerful national movement'.⁶¹ The destruction of the Kurdish emirates reinforced tribal frameworks and

⁵⁶ Erik Zürcher, *supra* n. 20, 50-51.

⁵⁷ *Ibid*, 61.

⁵⁸ David McDowall, *supra* n. 8, 53.

⁵⁹ Wadie Jwaideh, *supra* n. 14, 104.

⁶⁰ *Ibid*, 105.

⁶¹ Michael Eppel, *supra* n. 55, 256.

strengthened the status of the religious shaykhs.⁶² Indeed, Kurdish nationalist ideas did not gain substantial acceptance amongst the Kurds until after they had won the powerful support of the religious shaykhs and gained the imprimatur of their great learning and religious authority.⁶³ What can be said without hesitation is that the *tanzimat* reforms, which prefigured later attempts to build a centralised nation-state harnessed to the Turkish *ethnie*, had the knock-on effect of creating a new, albeit protean, Kurdish nationalism.

1.5 *World War I and the road to the stillborn Treaty of Sevres*

On 8th January 1918, US President Woodrow Wilson addressed both Houses of Congress and enunciated the war and peace program of the US in fourteen definite proposals. These proposals, commonly known as Wilson's fourteen points, included in point XII:

“The Turkish portions of the present Ottoman Empire should be assured a secure sovereignty, but the other nationalities which are now under Turkish rule should be assured an undoubted security of life and an absolutely unmolested opportunity of autonomous development...”⁶⁴

This, along with his argument that the peoples of Austria-Hungary should be accorded ‘the freest opportunity of autonomous development’⁶⁵ and that colonial claims should be ‘based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the Government whose title is to be determined’⁶⁶, formed part of what came to be known as the principle of self-determination (which is considered more fully in the next chapter). Wilson's twelfth point clearly encompassed the Kurds and was a clear statement that they should be entitled to some kind of self-determination.

⁶² *Ibid.*

⁶³ Wadie Jwaideh, *supra* n. 14, 105.

⁶⁴ Woodrow Wilson, *In Our First Year of the War: Messages and Addresses to the Congress and the People, March 5, 1917, to January 8, 1918*, (Harper and Brothers 2012), 138.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

During World War I, ethnic cleansing became an essential ingredient of the conflict within the Ottoman Empire and the dynamics of nation-state formation once again contributed to the destruction. This time, conflict was initiated between the Muslim Kurds and the Christian Armenians. Russia expelled Muslim Kurds from the border regions and garrisoned the areas it invaded with Armenian troops. In response, the Turks expelled and murdered Armenians with the help of Kurdish forces who, according to McDowall, were probably led to believe that it was either ‘them or us’⁶⁷. Since the Kurds and the Armenians shared overlapping territory, they were constantly reminded of their Christian neighbours’ connections with hostile European powers. The fact that minorities received the backing of foreign states and were seen as a threat to their host state turned them into marked citizens. All of this meant that Kurdish nationalism was put on hold during World War I as Turks and Kurds closed ranks to face the common dangers of war.⁶⁸ However, a small band of exiled Kurdish nationalists, including Sharif Pasha, the man who would eventually represent them for part of the Paris Peace Conference, continued to press for an independent Kurdish state.⁶⁹

By the time World War I came to a close, the UK had occupied Mesopotamia all the way up to Mosul *Vilayet*, which was supposed to belong to the French sphere of influence under the terms of the previously secret Sykes-Picot agreement. The British colonisers decided that it made economic sense to have Mosul, Erbil and Kirkuk as part of their zone of influence in Mesopotamia and wanted to establish a boundary in the Kurdish mountains in order to minimise defence costs.⁷⁰ In addition to this, the British were keen to establish a chain of autonomous Kurdish buffer zones along the edge of the border with Mesopotamia but were unable or unwilling to allocate the necessary resources in order to defend them because they were distracted by uprisings in Ireland, Egypt, Afghanistan and a volatile situation in India.⁷¹

By the time the Paris Peace Conference was convened, the Kurds had failed to form a unified front. According to the British High Commissioner there was “no such thing as a ‘Kurdish opinion’” because few Kurds looked any higher than their tribal aghas or religious shaykhs

⁶⁷ *Ibid*, 105.

⁶⁸ Wadie Jwaideh, *supra* n. 14, 128.

⁶⁹ *Ibid*.

⁷⁰ David McDowall, *supra* n. 8, 118-120.

⁷¹ Erik Goldstein, *The First World War Peace Settlements: 1919-1925*, (Pearson Education 2002), 60.

‘among whom there is little common ground’.⁷² According to him, the few educated diaspora Kurds who held separatist ideas were ‘very apt to exaggerate their own influence and importance’⁷³. Although Sharif Pasha, the Kurdish representative at the Paris Peace Conference, invoked the principle of self-determination and argued that Kurdistan formed an indivisible whole and ought to be assigned to a single mandatory power, he later began to talk of autonomy within what remained of the Ottoman Empire and got himself disowned by fellow members of the Kurdish Club who accused him of going back on a commitment to independence.⁷⁴ And so it was that the Kurds found themselves unrepresented on the eve of the peace treaty to be forged by the victorious allies.

Two developments in 1919 undermined Kurdish hopes of achieving independence or autonomy in eastern Anatolia: the landing of the Greeks in Smyrna, encouraged by the Allied forces, and the rise of Mustafa Kemal Ataturk and the Turkish War of Independence. Once again, the fear of being dominated by Christian powers drove the Kurds and Ataturk into an alliance to defend themselves against the Christian threat. Kurdish nationalism was once again placed on hold, and in September 1919 Ataturk informed the Great Powers that the government in Istanbul no longer represented the nation at the Paris Peace Conference.⁷⁵ None of this prevented the British from persuading the French that an autonomous Kurdistan was necessary: by this point, Ataturk was receiving assistance from the Bolsheviks; it would have been impossible for France to assume control over Kurdistan because they had been beaten back by Ataturk’s forces; and Britain was not ready to commit the resources necessary for its defence. The end result was that the representatives of Farid Pasha, the British puppet in Istanbul, were forced to sign the Treaty of Sevres even though it was ‘a surrenderist treaty of which they strongly disapproved’.⁷⁶

Article 62 of the Treaty of Sevres provided that a Commission composed of British, French and Italian representatives would draft a scheme of local autonomy for the predominantly Kurdish areas lying east of the Euphrates, south of Armenia and north of the Mesopotamian border. That scheme was to contain minority rights for other racial and religious groups living within the borders of Kurdistan. Article 64 provided the Kurds within the area defined under

⁷² David McDowall, *supra* n. 8, 132.

⁷³ *Ibid.*

⁷⁴ *Ibid.*, 133.

⁷⁵ David McDowall, *supra* n. 8, 129.

⁷⁶ *Ibid.*, 137.

Article 62 with the right to petition the League of Nations for full independence within one year, and provided that ‘no objection will be raised by the Principal Allied Powers to the voluntary adhesion to such an independent Kurdish State of the Kurds inhabiting that part of Kurdistan which has hitherto been included in the Mosul Vilayet’. Although this arrangement would not have included all the constituent parts of Kurdistan, it did at least hold out the possibility of an independent Kurdish state covering large swathes of present-day Turkish Kurdistan and Iraqi Kurdistan. The Treaty of Sevres also included several provisions concerning minority rights under Part IV. Article 145 provided that the Turkish government would organise a scheme for the organisation of an electoral system based on the principle of proportional representation of racial minorities and provided rights for linguistic minorities. Article 147 expanded on this right by providing that linguistic minorities would have an equal right with Turkish nationals to set up independent schools for tuition in their native languages. Article 148 added that in areas of high linguistic minority density, they should be provided with State funds for educational and other purposes.

Meanwhile on 28th January 1920, the last session of the Ottoman Parliament declared Turkey’s National Pact. The National Pact affirmed Turkey’s sovereignty and self-determination and demanded Turkish control over all non-Arab territories.⁷⁷ Two competing visions of self-determination came into conflict: Kurdish and imperial leaders’ belief that the Kurds should benefit from autonomy in Kurdistan as propounded by Woodrow Wilson, and Turkish leaders’ belief that they had the right to control all non-Arab lands in the former Ottoman Empire. As for Atatürk, Mango notes that during the War of Independence he “recognised specifically the multiethnic character of the Muslim population of Turkey” and “promised that local self-government would accommodate ethnic specificity”.⁷⁸ Indeed, in a telegram sent to a Diyarbakir notable Atatürk denounced the plan for an independent Kurdistan and argued that all Muslim ethnic components should work together to defend Turkish independence, but he also said that in order to secure Kurdish attachment to the Turkish State he was “in favour of granting all manner of rights and privileges”.⁷⁹ It is claimed that some of the Kurds gave their support in the War of Independence precisely “on the understanding that a common Muslim

⁷⁷ David L. Phillips, *supra* n. 2, 14.

⁷⁸ Andrew Mango, ‘Atatürk and the Kurds’ 35 *Middle Eastern Studies* (1999) 1, 22.

⁷⁹ *Ibid*, 6-7.

cause existed against Western interventionists, and that a future Turkish-Kurdish common multi-ethnic state would emerge””.⁸⁰

1.6 *The Treaty of Lausanne*

After suffering a series of defeats at the hands of Atatürk’s forces, Britain was forced to sign a more conciliatory treaty in order to obtain a peace agreement and secure its newly discovered oilfields in northern Iraq.⁸¹ The new Treaty achieved what Turkey wanted based on its National Pact except for certain areas such as Mosul Vilayet, the future of which was to be negotiated between the two powers or referred to the League of Nations if no agreement could be reached.

The Treaty of Lausanne, signed on 24th July 1923, is as striking for what it omits as for what it says. There is no mention anywhere in the treaty of Kurdistan, which is simply incorporated into the new Turkish state. The Treaty of Lausanne also differed in a marked respect from the Treaty of Sevres in terms of minority rights protection. Whereas the Treaty of Sevres purported to grant rights to ethnic, linguistic and religious minorities, the Treaty of Lausanne focused on rights for non-Muslim minorities, which clearly had the Armenians in mind. Article 41, for example, states that “where a considerable proportion of non-Moslem nationals are resident, adequate facilities for ensuring that in primary schools the instruction shall be given for the children of such Turkish nationals through the medium of their own language”. This provision is incongruous because members of particular minority groups qualify for linguistic protection not by merit of their linguistic differences *vis-à-vis* the dominant Turkish language group, but by merit of their *religious* differences. The more general provisions in Article 39 accrue to “Turkish nationals of non-Turkish speech” but only provide for the “oral use of their own language before the Courts”. Mother-tongue education and other important domains of minority language use (which are necessary to preserve and develop the language) are excluded. Under Article 38 other minority groups were granted the straightforward right to non-discrimination which, as Kymlicka points out, still allows the dominant nation in multinational states to systematically privilege the dominant nation by, for example, making the dominant language the only official language.⁸² Turkey continues to rely on the provisions of

⁸⁰ Henri J. Barkey and Graham E. Fuller, *Turkey’s Kurdish Question* (Carnegie 1998), 9.

⁸¹ *Ibid.*, 142.

⁸² Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1996), 51.

the Treaty of Lausanne in its argument that only particular non-Muslim minorities qualify for minority rights protection under international human rights law. It is, to this day, used as the legal basis for denying universal minority rights to the Kurds in Turkey.

1.7 *The Kurdish Question*

The fact that the Kurds ended up without a state of their own did not lead inexorably to the character of what is now called the Kurdish Question. There was nothing preordained or inescapable about war and strife between Kurds and the Turkish State. Indeed, it is conceivable that if Atatürk's statements about accommodating ethnic specificities through local self-government had been put into practice in a meaningful way then the Kurdish Question in Turkey would have taken a very different and less deadly form. The division of Kurds between the states of Turkey, Iran, Iraq and Syria might well have led to a yearning for some form of cross-border cooperation, and the brutalisation of the Kurds under the Ba'ath Parties in Syria and Iraq, and under the Islamic theocracy in Iran, would surely have had some kind of knock-on effect in the Kurdish regions of Turkey. In other words, the emergence of a Kurdish Question in Turkey in *some form* would probably still have occurred even if Atatürk's statements had been put into practice. But the treatment of Turkey's Kurds after the establishment of the Turkish Republic has undoubtedly aggravated the issue.

The new Turkish Republic abandoned Atatürk's original statements about accommodating Kurdish identity through local self-government. Mango suggests that this was done in service of Atatürk's drive for 'absolute power' in order to transform Turkey into a modern, secular nation-state⁸³. The resulting Turkish nationalism was civic, in the sense that assimilated Kurds could become Prime Ministers, Presidents, Members of Parliament and Chiefs of Staff.⁸⁴ It was also ethno-cultural, in the sense that unassimilated Kurds in the predominantly Kurdish South-East of Turkey can expect a life of poverty, oppression, and continued pressure to assimilate into the dominant Turkish *ethnie*. Since the Turkish nation is *de facto* defined in cultural and religious terms, it is possible for Kurds to join that nation and reap the rewards. But failure to assimilate carries heavy costs.

⁸³ Andrew Mango, *supra* n. 78, 18-19.

⁸⁴ *Ibid*, 11-12.

Subsequent chapters will detail some of the Turkish State's policies and practices concerning the Kurds. Chapter Five will explain how the Turkish Republic suppressed the Kurdish language in all spheres, particularly in the sphere of education. The idea was that by spreading the Turkish language at the expense of the Kurdish language, the Kurds would become civilized Turks. The unwanted Kurdish identity could be eradicated through this method (among others) more easily than through genocide and expulsion. Chapter Six will discuss the limits placed on Kurdish political participation and the continuing and flagrant rejection of opportunities to discuss the Kurdish Question through peaceful political discourse.

It was against this background of severe repression, and the failure to win much in terms of Kurdish cultural and political rights via non-violent struggle, that the Kurdistan Workers Party (PKK) was born.⁸⁵ Between 1984 and 2011, the conflict between the PKK and the Turkish State resulted in the deaths of more than 30,000 people.⁸⁶ In the two years of conflict between 2015 and 2017, the conflict claimed a further 2,981 lives⁸⁷ and was accompanied by striking atrocities.⁸⁸ The Kurdish Question evolved in the 1980s and 1990s into a question of identity and recognition.⁸⁹ Before then, it was centered around the restoration of Islam as the State's central organising principle and later around socialist reaction to the State.⁹⁰

There is technically no single Kurdish Question; rather the content of the question varies between Kurds. As Bozarslan explains, throughout the twentieth century different States, world powers, and Kurdish movements attributed different meanings to the Kurdish Question.⁹¹ Even so, from a Kurdish perspective it is about one broad demand, namely "to become masters of

⁸⁵ Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* (NYU 2007).

⁸⁶ *International Crisis Group*, 'Turkey: Ending the PKK Insurgency' (20 September 2011) <<https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-ending-pkk-insurgency>> accessed 4 February 2018.

⁸⁷ *International Crisis Group*, 'Turkey's PKK Conflict Kills almost 3,000 in Two Years' (20 July 2017) <<https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkeys-pkk-conflict-kills-almost-3000-two-years>> accessed 4 February 2018.

⁸⁸ *UN OHCHR*, 'Report on the human rights situation in South-East Turkey: July 2015 to December 2016' (February 2017) <https://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf> accessed 4 February 2018.

⁸⁹ Fuat Keyman and Sebnem Gumuscu, *Democracy, Identity and Foreign Policy in Turkey: Hegemony through Transformation* (Palgrave 2014), ch 7.

⁹⁰ *Ibid*, 100.

⁹¹ Hamit Bozarslan, 'When the Present Sends Back to the Past: Reading the Kurdish Issue in the 2010s' 27 *Middle East Critique* (2018) 7, 9.

their own destiny and to obtain the right to have their own say on who they thought they were in history or in any given present-time, and who they wanted to be in the future”.⁹² In other words, it is about self-determination understood as the right of the Kurdish group, and individual members thereof, to freely pursue their own destinies. It is a matter of accommodating two competing nationalisms within the same state. Within that broad articulation of the Kurdish Question, there are many sub-claims. Some will prioritise the need for political pluralism in Turkey through some form of territorial autonomy or federalism (some will even prioritise the drive for an independent Kurdistan united with Kurdish areas in Iraq, Syria and Iran). Others will prioritise cultural rights such as the right to be educated in the Kurdish language, to publish newspapers in Kurdish, and to broadcast in Kurdish. Others will prioritise economic problems, and the need to develop the economy of the impoverished Kurdish south-east. And there is a vast array of different configurations that combine these political, cultural, and economic issues into different forms. But it is nonetheless possible to identify a common set of sub-claims that together make up the core of the Kurdish Question. *International Crisis Group* identifies four main lines of reform that the Turkish State, and other interested stakeholders, ought to work on. These are: the right to mother-tongue education (considered in Chapter Five), fairer political representation through lowering the electoral threshold for representation in parliament (considered in Chapter Six), decentralisation (considered in Chapter Seven), and the removal of discriminatory laws and practices.⁹³ As noted in the next section, economic issues are also a major cause of animosity between some Kurds and the Turkish State. The Kurdish Question asks how Turkey ought to accommodate this bundle of claims and bring to an end the violence between certain Kurdish groups and the Turkish State. This thesis asks how international human rights law, through the particular lens of the group right of self-determination and its interaction with various individual rights, can interface with certain of those claims.

In summary, it was the transformation of the Ottoman Empire into a nation-state harnessed to a nation conceptualised in terms of the dominant Turkish *ethnie*, and the accompanying exclusion of the Kurds, that originated the Kurdish Question. And the Kurdish Question itself has changed over time, whilst maintaining its fundamentally Kurdish character. There were

⁹² *Ibid*, 8.

⁹³ International Crisis Group, *Turkey's Kurdish Impasse: The View from Diyarbakir* (30 November 2012) <<https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-kurdish-impasse-view-diyarbakir>> accessed 6 February 2018.

certainly stirrings of Kurdish discontent (albeit mostly of a tribal nature) during Ottoman rule, but it was the collapse of the Empire, the creation of a nation harnessed to the dominant Turkish *ethnie*, the refusal to grant even the most basic minority rights to Kurds, and the oppression of Kurdish culture and language that catalysed a nascent Kurdish nationalism and led to conflict.

1.8 Economic factors

The rest of this thesis concentrates on cultural and political aspects of the Kurdish Question, and how international law interfaces with certain core aspects of Kurdish claims *vis-à-vis* the Turkish State. But it should be briefly noted that economic factors also played a major role in spurring Kurdish nationalism, and continue to play a major role in the Kurdish Question. As McDowall explains:

“Economic deprivation is probably the single most important impetus to nationalism among ordinary Kurds. Unemployment, absence of prospects and a sense of grievance against the richer part of Turkey are major factors in nationalist feeling, quite apart from political discrimination against Kurds”.⁹⁴

Between 1993 and 2001, the average Gross National Product per capita in the predominantly Kurdish regions of Turkey was roughly one-third of the country’s average.⁹⁵ In 1979, the Kurdish regions accounted for 8.2 per cent of national income. By 2001 it had fallen to 7.7 per cent. And between 2004 and 2006, it fell even further to 6.9 per cent.⁹⁶ Thus, by 2006, their share of national income was less than half their share of the total population.⁹⁷ In terms of average per capita income, the Kurdish regions fall short of Turkey’s average by a striking 54 per cent.⁹⁸ According to the UN Development Programme, eighteen of the twenty least developed provinces in Turkey are in the Kurdish region.⁹⁹ At a purely subjective level, any visitor to the Kurdish regions of South-East Turkey will be struck by the differences in terms

⁹⁴ David McDowall, *The Kurds: A Nation Denied* (Minority Rights Group 1992), 53-54.

⁹⁵ Veli Yadirgi, *The Political Economy of the Kurds of Turkey: From the Ottoman Empire to the Turkish Republic* (CUP 2017), 233.

⁹⁶ *Ibid*, 245.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ *Ibid*, 233.

of development between those regions and the rest of the country. Life for many ordinary Kurds in South-East Turkey is a daily struggle against economic hardship; a disempowering situation that cannot but breed resentment.

Underdevelopment and poverty in the predominantly Kurdish South-East was, from the very early years of the Turkish Republic, conceived as a potent weapon to prevent the spread of Kurdish nationalism and prevent possible separatist threats. Indeed, one of the early architects of the Turkish State's Kurdish policy argued that "economic development and wealth would accelerate the level of consciousness and thus lead to the development of nationalism among the Kurds".¹⁰⁰ In order to prevent that threat from emerging, it was argued that the State should adopt a policy of deliberate underdevelopment.¹⁰¹ Yadirgi identifies this policy of deliberate underdevelopment, alongside the forced deportation of Kurds and the assimilation of Kurds, as part of a strategy to "procure the densification and power of the dominant ethnic group, the Turks, at the expense of the Kurds... with the anticipation that the latter would gradually be extinguished or become a powerless ethnic entity".¹⁰² The processes of resettlement and assimilation were intimately connected with the process of underdevelopment as, for example, the forced resettlements under the 1934 Settlement Act prevented the Kurdish regions from accruing the benefits of Turkish *étatisme* (State intervention in the economy).¹⁰³

In the 1950s, an alliance between the Turkish State and wealthy Kurdish tribal elites meant that land in the Kurdish regions continued to be concentrated in the hands of a few wealthy landlords, at the expense of the peasant population.¹⁰⁴ This, writes Yadirgi, "was grounded on the shared objective of maintaining the prevailing economic and political order increasingly opposed by large segments of the Kurdish society in Turkey".¹⁰⁵ The very tribal structures that the State focused upon to mark the Kurds as backwards and uncivilized people were reinforced by the State in order to co-opt them.

¹⁰⁰ *Ibid*, 167.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*, 168.

¹⁰³ *Ibid*, 176-185.

¹⁰⁴ *Ibid*, 204.

¹⁰⁵ *Ibid*, 205.

In the decades prior to the 1980 coup the preconditions for socioeconomic development, including land reform and adequate public investment, were never implemented “because all of these measures were antithetical to the Turkish State’s policy of controlling the overwhelmingly Kurdish regions”.¹⁰⁶ All of this pre-dates the start of the PKK insurgency, which so often shoulders *all* of the blame for the underdevelopment of the Kurdish regions of Turkey. In fact, the PKK insurgency and the State’s violent response to it is only one among several factors that contribute to the striking underdevelopment of the predominantly Kurdish South-East.¹⁰⁷ The vastly insufficient level of State investment is another major contributory factor.¹⁰⁸ To take investment in education as an example, the western province of Kocaeli received three times more public investment in education between 2002 and 2007 than predominantly Kurdish Diyarbakir, despite having a roughly equal population size.¹⁰⁹ This lack of public-sector investment plays an important role (alongside the frequently violent and unstable conditions in the south-east) in dissuading private sector investment.¹¹⁰

As Yadirgi’s study concludes, the Kurdish Question and the underdevelopment of the Kurdish regions of Turkey are not straightforward results of the PKK insurgency. They in fact pre-date it “and are corollaries of the denial, by the dominant State ideology, Turkish nationalism, of differences in general, and the Kurds’ existence, issues and rights in particular”.¹¹¹ Both economic underdevelopment and the Kurdish Question are in a symbiotic relationship. Indeed, the pressure to escape economic privation leads many Kurds to leave the Kurdish regions and become sources of cheap labour in other parts of Turkey. This makes them more vulnerable to assimilationist pressures. The same dynamic works in reverse: Continued assimilationist pressures in the Kurdish regions have led to instability and war, which in turn contributes to the region’s economic underdevelopment. Yadirgi argues that this underdevelopment will endure as long as the Kurdish Question remains unresolved.¹¹²

¹⁰⁶ *Ibid*, 213.

¹⁰⁷ For data on the underdevelopment of the Kurdish regions relative to the rest of Turkey *see ibid*, 233-246.

¹⁰⁸ *Ibid*, 246.

¹⁰⁹ International Crisis Group, *supra* n. 93, 12.

¹¹⁰ Veli Yadirgi, *supra* n. 95, 252.

¹¹¹ *Ibid*, 272.

¹¹² *Ibid*, 273. The European Parliament is of the same opinion, noting that sustainable prosperity will only come with ‘a fair political settlement of the Kurdish Question’: see European Parliament Resolution of 8 February 2018 on the Current Human Rights Situation in Turkey (2018/2527(RSP)), para. 13.

1.9 Conclusion

In conclusion, there is no easy way of defining Kurdishness and, given the complexity of human social life, it is probably undesirable to attempt too strict a description. The lack of a Kurdish state with the capacity to mould a single unifying language and culture, and the division of the Kurds among four historically hostile states, has helped to ensure the ongoing heterogeneity of the Kurdish community. There is, nevertheless, such a thing as a Kurdish people with a subjective sense of community and with common objective distinguishing features, however much the latter are subject to variation and overlap with neighbouring cultures and languages. The existence of Kurds, in other words, is as much a fact as the existence of Turks, Arabs, and Persians.

As a religiously defined polity, the concepts of ethnic nation and ethnic minority were alien to the Ottoman Empire for much of its history. Religious communities were organized in *millets* and, while acknowledging their second-class status, were able to enjoy substantial autonomy over particular affairs of importance to them. Although the mostly Muslim Kurds did not benefit from the *millet* system, their tribal leaders were able to carve-out spheres of autonomy for themselves. But with the growth in Europe of secular justifications for the existence and practice of states, primarily in terms of the ruling nation and the minority *other* against which it is defined, nationalism began to spread to certain parts of the Ottoman Empire. Catalysed by foreign interventions, this began to call into question the legitimacy of the Empire and aided the development of centralizing tendencies, in particular during the *tanzimat* period. To the extent that there were Kurdish rebellions during this period, they were largely tribal affairs. The eventual development of Kurdish nationalism was, to a significant extent, a reaction to the growth of other nationalisms and to the oppression of the community which began under the Ottoman Empire and intensified under Atatürk's rule.

To sum up, the creation of a sovereign Turkish Republic and the ongoing attempt to forge out of its ethnically and religiously heterogeneous population a single nation harnessed to a single Turkish *ethnie* has given rise to a range of negative pathologies affecting the Kurds. As Richard Falk puts it, the Kurdish situation in Turkey is one in which "the legal and political ideal of territorial unity causes moral havoc and social, economic, and cultural injustice resulting in

great suffering and endless strife for these entrapped peoples”.¹¹³ The specifics of these pathologies—particularly as they affect the Kurdish language and Kurdish political participation—will be analysed in detail in later chapters. The question, then, is how (if at all) the norms contained in international human rights law can help to address those negative pathologies and offer a better way of managing, if not solving, the Kurdish Question in Turkey.

¹¹³ Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge 2000), 102.

CHAPTER TWO

2 The Historical Development of Self-Determination

The purpose of this chapter is to chart the development of self-determination from its early conceptualization through to the postcolonial moment and the end of the Cold War. In so doing, the chapter seeks to outline some of the complex interactions that led the right or principle to mean different things at different historical conjunctures. The broader aim of the chapter is to enable the author to go on to develop a plausible doctrinal and theoretical account of the contemporary right of self-determination which is grounded in its historical development

In common with other scholars, this chapter will take the French Revolution as its starting-point and argue that the concept of self-determination originated in an emerging secular form of state legitimization which took the nation as its primary focal point. The idea was taken-up by liberal philosophers such as John Stuart Mill, who was an early proponent of the notion that state boundaries ought to coincide with national boundaries and of the notion that “backwards” nations ought to be subordinated to more advanced nations. The chapter then fast-forwards to the interaction between Marxist-Leninist and Wilsonian self-determination, arguing that the latter was (notwithstanding its decolonizing effects within Europe) a racially differentiated principle that aimed to absorb and neutralise the global revolutionary potentialities of the former, which was committed—in theory if not always in practice—to a right of small nations and colonised peoples to independence. Although a newly autonomous international law which was attentive (but not subservient) to nationalist claims emerged during the interwar period, the League of Nations Mandates system ensured that colonialism would continue on a new and seemingly more legitimate footing. It was the determined efforts of postcolonial states that transformed self-determination from a principle of international affairs into a *right* held by “peoples” without distinction. But those postcolonial states well knew that seizing the political form of the nation-state from their former colonisers would not be enough to overcome a deeply unequal international order which would, in the end, underpin neo-colonialism. It was the very real need to remake this international order that led postcolonial states to prefer strong, centralised governance and the attendant rejection, in practice, of any links between self-determination and minorities. Furthermore, postcolonial self-determination served to reify colonial borders and shift self-determination from a *national* entitlement to a *territorial*

entitlement. The history recounted in this chapter ends with the post-Cold War resurgence of interest in internal self-determination and its links with the rights of sub-state minorities.

2.1 *The French Revolution: a convenient point of departure*

It is generally recognised that self-determination had no fixed place in international affairs prior to the early twentieth century. Indeed, as Orentlicher points out, “Before 1919, if international law enforced any conception of self-determination, it meant one thing: Established states had a right to be left alone by other states”.¹ Although this idea can be traced back at least as far as the concept of Westphalian sovereignty, which can be characterised as an organising principle of political life based on the exclusion of foreign actors from domestic affairs², it is also inherent in the positivism that gripped international law in the century leading up to 1914. Positivism, with its rejection of natural law reasoning and its attendant focus on state will, relies upon the sovereign equality of all states and, in turn, provides easy justification for the principle of non-intervention.³ Ultimately then, pre-1914 international law “was essentially indifferent to the mode by which sovereignty was established” and “far from legitimizing national aspirations to statehood, international law refused to even address such claims until they had succeeded”.⁴ As we will see, this strict positivism underwent some quite radical changes after World War I.

This is not to say that the ideal of self-determination was unexplored in political and democratic philosophy. Indeed, according to Held, the Italian city-republics of the twelfth century “marked the first occasion in post-classical political thinking when arguments were developed for and on behalf of self-determination and popular sovereignty”.⁵ The core of these arguments was “that the freedom of a political community rested upon its accountability to no authority other than that of the community itself”.⁶ It is therefore clear that some of the concepts normally associated with modern self-determination did not spring into existence during the French

¹ Diane Orentlicher, ‘Separation Anxiety: International Responses to Ethno-Separatist Claims’ 23 *Yale Journal of International Law* (1998) 1, 22.

² Stephen Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press 1999), 20.

³ Stephen Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014), 244.

⁴ Diane Orentlicher, *supra* n. 1, 23.

⁵ David Held, *Models of Democracy*, (2nd edition) (Polity Press 1996), 42.

⁶ *Ibid.*

Revolution, but exigencies of space dictate that the French Revolution is a useful starting point. For present purposes, the most important aspect of the French Revolution is neatly summed-up in Article 3 of the Declaration of the Rights of Man, which was approved by the National Assembly of France in 1789:

“The principle of all sovereignty resides essentially in the nation. No body or individual may exercise any authority which does not proceed directly from the nation.”⁷

The idea that sovereignty can be separated from the state or its rulers and vested in the nation was, in part, a development of earlier ideas formulated by Jean-Jacques Rousseau, who argued in *On the Social Contract* that sovereignty is merely the exercise of the “general will” and that it is therefore inalienable (since power can be transferred but not will) and indivisible (since will is either general or it is not). This development can be expressed in terms of its crucial difference from the then prevailing perspective of international law. As Keitner points out, the Westphalian model offered few criteria for delineating states, whereas the French Revolutionary model, in its ideal version, posited that “prepolitical nations” should determine the legitimacy of states. In other words “If the Treaty of Westphalia provides a convenient, though not entirely historically accurate, shorthand for the birth of the modern state system, then the French Revolution performs a similar function for the idea of the modern nation-state”.⁸ As we will see, both traditional positivism *and* the idea of prepolitical nations found their way into the post-World War I peace settlements.

The French Revolution also discloses some of the paradoxes that continue to give rise to destructive pathologies during the nation-state building process. These paradoxes can be conveniently labelled *conception*, *constitution*, and *composition*. The paradox of *conception* highlights the difficulty of conceiving of a nation independently of its institutional manifestations. This may be even more acute in so-called “voluntarist” conceptions of the nation, which are not necessarily based on ethnic ties, since it seems to challenge the idea that prepolitical nations actually exist. The paradox of *constitution* concerns the fact that in order to translate their theoretical power into actual political power, nations must adopt concrete

⁷ *The Avalon Project* ‘Declaration of the Rights of Man’ <http://avalon.law.yale.edu/18th_century/rightsof.asp> accessed 05/01/2016.

⁸ Chimène I. Keitner, ‘National Self-Determination in Historical Perspective: The Legacy of the French Revolution for Today’s Debates’ 2 *International Studies Review* (2000) 3, 6-7.

institutions. To that end, the need to identify legitimate spokespeople for the nation contains a risk that power seekers will hijack the nation's power to serve their own ends. The paradox of *composition* focuses on the difficult need to distinguish between insiders and outsiders.

The destructive pathologies to which these paradoxes give rise can be seen in the history of the French Revolution as well as the history of the Kurdish Question in Turkey, and there are some striking parallels between the two. For example, although the French Revolution started with a voluntarist conception of the nation (how could it have been otherwise when French was the predominant language in only fifteen of the country's eighty-nine departments, and when six million members of the nation could not speak any French while another six million could not speak it properly?) it had descended into what Higonnet calls "linguistic terrorism" by February 1794.⁹ Although what we would today call terrorism was hardly a novel feature of the French Revolution, its use as a weapon against non-French speaking peoples was a symptom of the fact that successive revolutionary regimes began to pursue a monolithic and exclusionary version of the nation in response to the perceived need to glue the nation together as a bulwark against competing sources of loyalty and authority.¹⁰ As Keitner points out, language became one of the essential tools for forging a unified national identity.¹¹ This demonstrates that there are certain tensions built into the construction of nation-states and that these tensions have a tendency to result in the oppression of those who are considered alien to the founding nation. As Chapter Four will explain, it is precisely these pathologies which the modern right of self-determination is supposed to address.

Although the importance of the nation-to-state formation was emphasised by the French Revolution, the principle of self-determination was primarily used to justify the annexation of lands from other sovereigns.¹² According to Cassese, while France's alleged adherence to the principle of self-determination "paved the way for the 1791 annexation of the territory of Avignon and the 1793 annexation of Belgium and the Palatinate," it did not apply to colonial peoples or to minorities; nor did it explicitly refer to the peoples' right to choose their own

⁹ Patrice L.R. Higonnet, 'The politics of linguistic terrorism and grammatical hegemony during the French Revolution' 5 *Social History* (1980) 41, 49.

¹⁰ Chimène I. Keitner, *supra* n. 8.

¹¹ *Ibid.*

¹² Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995), 12.

rulers”.¹³ That said, it is important to recognise the important legacy of the French Revolution. As Cassese puts it:

“The right [of self-determination] devolved implicitly from the profoundly anti-despotic democratic spirit that inspired the French revolutionaries in the years 1789-92. The modern day right of peoples to external self-determination has its origins in this early principle...”¹⁴

2.2 *Self-determination in the liberal era*

The Congress of Vienna was formed in the aftermath of the French Revolutionary wars in order to resolve certain questions regarding state boundaries and rulers. But rather than seizing the nascent idea of self-determination, the leaders of Europe resorted to Great Power politics. In the context of the territorial settlements in western and central Europe, Lowe argues “it was here that the peacemakers most clearly revealed their limited vision, missing the opportunity to satisfy aspirations for good government and some viable form of national identity”.¹⁵ There is therefore little in this history of international affairs to suggest that self-determination was anything more than an isolated animating principle or idea. But when one looks beyond the machinations of the nineteenth century European rulers, it is possible to discern a further evolution in the idea of self-determination.

In his *Considerations on Representative Government*, first published in 1861, John Stuart Mill argued that there was a *prima facie* case for organising separate nationalities into separate states. In Mill’s words:

“It is in general a necessary condition of free institutions, that the boundaries of governments should coincide in the main with those of nationalities.”¹⁶

¹³ *Ibid.*

¹⁴ *Ibid* at p. 13

¹⁵ John Lowe, *The Concert of Europe: International Relations 1814-70* (Hodder and Stoughton 1990), 23.

¹⁶ John Stuart Mill, *On Liberty and Other Essays*, (OUP 1998), 430.

Mill's vision was, however, conditioned by his argument that a nation had to meet the threshold of "viability" in terms not only of its size and economic strength, but also of its stage of advancement and civilization, in order to form a state.¹⁷ Eric Hobsbawm adds that *every* impartial mid-nineteenth century observer took the view that "The small people, language or culture fitted into progress only insofar as it accepted subordinate status to some larger unit or retired from battle to become a repository of nostalgia and other sentiments."¹⁸ As we will see, Marx, Engels, and the early Marxists were of a similar mindset.

So although liberal thinkers attached some significance to the self-determination (defined as separate statehood) of nations, its significance was circumscribed by the requirements of progress and viability. The continuity between this view and the developments of the French Revolution is highlighted by Mill's argument that it was better for a Breton or a Basque of French Navarre to be absorbed into the French nation instead of "sulking on his own rocks, the half-savage relic of past times, revolving in his own little mental orbit, without participation or interest in the general movement of the world."¹⁹ All of which suggests that in the liberal era the ideal of the nation-state and national self-determination as the basis of state creation had spread; and the idea of absorbing supposedly peripheral or backward nations into larger or more advanced nations in the interests of "progress" had also taken hold. Both of these ideas, with some crucial modifications, eventually came to inform the post-World War I peace settlements.

2.3 *Marxist and Marxist-Leninist self-determination*

In *The Degradation of International Law?* Bill Bowring reflects on the idea of self-determination as the "radical kernel of international law"²⁰, highlighting the Leninist origins of the right and its substantial difference from the later Wilsonian version of self-determination.

The Marxist intellectual tradition—and the socialist tradition more broadly—already had a rich history of engagement with the national question prior to Lenin's theorisation of self-

¹⁷ Eric Hobsbawm, *Nations and Nationalism since 1780* (CUP 1990), 34.

¹⁸ *Ibid.*, 41.

¹⁹ John Stuart Mill, *supra* n. 16, 431.

²⁰ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Routledge-Cavendish 2008).

determination. For Marx and Engels, struggles for the self-determination of nations were to be supported or opposed on purely strategic grounds, always bearing in mind the end-goal of a classless socialist society. They supported Polish independence from Russia, for example, in order to weaken the reactionary Russian Empire. Broadly speaking, Marx and Engels considered the highly centralised nation-state form the most amenable to the development of capitalist relations of production and to the subsequent creation of opposing classes which would eventually lead to socialism. As Bookchin puts it:

“They held the nation-state to be good or bad insofar as it advanced or inhibited the expansion of capital, the advance of the “productive forces,” and the proletarianization of preindustrial peoples. In principle, they looked askance at the nationalist sentiments of Indians, Chinese, Africans and the rest of the noncapitalist world, whose precapitalist social forms might impede capitalist expansion”.²¹

In Marx and Engels’ day, capitalism was in many places a *progressive* force that was responsible for tearing down feudalism and creating the historical preconditions necessary for a socialist revolution. The development of highly centralised nation-states—in some cases assimilating small, “backward” nations—was necessary in the name of progress. One cannot help but notice the similarities with John Stuart Mill’s thinking.

Lenin’s major work on the right of nations to self-determination was published in 1914.²² In this study, Lenin claims to extract the meaning of self-determination “not by juggling with legal definitions or ‘inventing’ abstract definitions, but by examining the historico-economic conditions of the national movements...” and reaches the conclusion that “the self-determination of nations means the political separation of these nations from alien national bodies, and the formation of an independent national state”.²³ Like Marx, Lenin believed that the nation-state form was the norm of capitalism, since “For the complete victory of commodity production, the bourgeoisie must capture the home market, and there must be politically united territories whose population speak a single language, with all obstacles to the development of

²¹ Murray Bookchin, ‘Nationalism and the “National Question”’ 2 *Democracy & Nature: The International Journal of Inclusive Democracy* (1994).

²² V.I. Lenin, *The Right of Nations to Self-Determination*,
<<https://www.marxists.org/archive/lenin/works/1914/self-det/>> accessed 06/01/2016.

²³ *Ibid.*

that language and to its consolidation in literature eliminated”.²⁴ And like Marx, Lenin argued that struggles for national self-determination ought to be supported insofar as they served the instrumental goal of bringing closer a worldwide socialist revolution. Given the concrete features of the national question in Russia at that time—specifically the Russian Empire’s history of nationalistic chauvinism against its peripheral nationalities and the need to win the support of those nationalities for the Bolsheviks—Lenin supported the right of those small nations to secede from Russia. Ultimately, the equal right of nations to their national state was the only way to create an alliance of all proletarians of all nations on an equal footing.²⁵ This theoretical account of self-determination is neatly summarised by the Soviet legal scholar Evgeny Pashukanis:

“The communist proletariat of advanced countries had to support [bourgeois-democratic] movements; with all its strength it had to struggle so that the accumulation of centuries of ill will and the distrust by backward people of the dominant nations – and of the proletariat of these nations – was overcome as quickly as possible. It was impossible to achieve this goal without proclaiming and conducting in practice the right of national self-determination.”²⁶

In his *Report on Peace*, Lenin stated that the incorporation of a small or weak nation into a dominant, powerful state without the consent of that nation, and irrespective of that nation’s degree of “backwardness,” was an unacceptable act of annexation.²⁷ The early Soviet government was quite consistent in its application of self-determination, recognising the application of the right to Ukraine and Turkish Armenia and the independence of Estonia, Latvia and Lithuania.²⁸

Although Lenin’s instrumental view of national self-determination was in tune with Marx’s, the progressive force of capitalism had waned by the time he came to consider the national

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Evgeny Pashukanis, *Lenin and Problems of Law*,

<<https://www.marxists.org/archive/pashukanis/1925/xx/lenin.htm>> accessed 02/09/19.

<<https://www.marxists.org/archive/pashukanis/1925/xx/lenin.htm>> accessed 06/01/2016.

²⁷ V.I. Lenin, *Report on Peace*, <<https://www.marxists.org/archive/lenin/works/1917/oct/25-26/26b.htm>> accessed 06/01/2016.

²⁸ Bill Bowring, *supra* n. 20, 19.

question. Since capitalism was now a reactionary and imperialist force, it was necessary to support the liberation struggles of colonised peoples in Africa and elsewhere. While in Marx's day such struggles were *reactionary* because they impeded the growth of progressive capitalism, in Lenin's day they were *progressive* because they served to undermine the power of reactionary capitalism.²⁹ Although the strategic choices changed, the underlying instrumental goal remained the same.

Although there was some consistency in the early Soviet Union's application of self-determination—for example, the Soviet Peace Treaties of 1920 which recognised a right of secession³⁰—Stalin decided that some demands for self-determination, such as those emanating from the periphery of Russia, did not further the interests of the proletarian revolution because they were deeply counter-revolutionary demands, and the later USSR—particularly after World War II—brutally repressed self-determination movements within its own sphere of interest whilst providing substantial material and diplomatic support to anti-colonial movements in the European colonies.³¹ All told, as Bookchin puts it, “Marxists generally regarded the national aspirations of oppressed peoples as matters of political strategy that should be supported or opposed for strictly pragmatic considerations, irrespective of any broader ethical ones.”³² It was, for Marxists, always a question of how to instrumentalise nationalism against capitalism.

However partial and hypocritical its practical application by the Soviet Union, at least in *theory* Marxist-Leninist self-determination proclaimed a rather unique right of small nations to secede from their parent states and a right of colonised peoples to independence.

2.4 *Wilsonian self-determination*

The conflict between Lenin and US President Woodrow Wilson is an important part of the development of self-determination. It is often assumed that US President Woodrow Wilson

²⁹ Murray Bookchin, *supra* n. 21.

³⁰ L Mälksoo, ‘The Soviet Approach to the Right of Peoples to Self-Determination: Russia’s Farewell to *jus publicum europaeum*’, 19 *Journal of the History of International Law* (2017), p. 200.

³¹ Bill Bowring, ‘Marx, Lenin and Pashukanis on self-determination: response to Robert Knox’ 19 *Historical Materialism* 113.

³² Murray Bookchin, *supra* n. 21.

invented self-determination in his famous Fourteen Points speech before Congress on January 8, 1918. This is a flawed assumption in two respects. First, Wilson did not invent self-determination (although some of the concepts that fell under the self-determination formula were his own), and there is much to suggest that he adopted the term as a response to the Bolshevik challenge³³ and as a grand ideal to justify US participation in the war after the Bolshevik exposure of the Allied secret treaties, which exposed the imperialist ambitions of European powers.³⁴ Second, although some of the ideas that would later become parts of Wilsonian self-determination were present in the fourteen points speech - such as Point XII on the principle that non-Turkish nationalities should be afforded an “absolutely unmolested opportunity of autonomous development³⁵,” the phrase ‘self-determination’ was not mentioned until February 11, 1918.

It seems that Wilson’s concept of self-determination changed over time. In his earlier addresses to Congress he repeatedly emphasised his belief that self-governed nations were a *sine qua non* of peaceful co-existence, hence his argument that “A steadfast concert for peace can never be maintained except by a partnership of democratic nations” and his message to Congress on April 2, 1917: “...the menace to that peace and freedom lies in the existence of autocratic Governments backed by organised force which is controlled wholly by their will, not by the will of their people”.³⁶ During this phase of Wilsonian self-determination, the focus was on ensuring democratic rule and preventing unjust occupations and annexations. This was a continuation of his pre-war thought on self-government, which Pomerance describes as “a vague amalgam of what may be termed ‘internal self-determination’”.³⁷ In his famous fourteen points speech, Wilson spoke of the need to adjust the frontiers of Italy “along clearly recognizable lines of nationality” and of the need for the autonomous development of the various nationalities then under Turkish rule. He also spoke of the end of “the day of conquest and aggrandizement,” suggesting a new way of dealing with territorial transfer and state creation. Almost a year later, Wilson was using the phrase “self-determination” and extolling

³³ Erez Manela, *The Wilsonian Moment* (OUP 2007).

³⁴ Allen Lynch, ‘Woodrow Wilson and the principle of ‘national self-determination’: a reconsideration’ 28 *Review of International Studies* (2008) 419.

³⁵ Woodrow Wilson, *In our First Year of War: Messages and Addresses to the Congress and the People* (Harper & Brothers 1918).

³⁶ *Ibid.*

³⁷ Michla Pomerance, ‘The United States and Self-Determination: Perspectives on the Wilsonian Conception’ 70 *American Journal of International Law* (1976) 1, 17.

the principle that all “well defined national aspirations should be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism...” adding that territorial settlements must be made “for the benefit of” the populations concerned.³⁸ He also attempted to add an article to the League of Nations Covenant that would have permitted territorial readjustments under certain circumstances³⁹.

As Cassese points out, Wilson actually propounded four different variations of self-determination. First, he advocated the right of each people to choose the form of government under which it would live. Second, to restructure Europe in accordance with national desires. Third, self-determination should be the criterion governing territorial change. Fourth, self-determination should be reconciled with the interests of colonial powers in the settlement of colonial claims.⁴⁰

As the below section on the post-World War I settlements will explain, as well as being a response to the Bolshevik challenge, this principle of self-determination was an attempt to harness the popular movements around the so-called national question and, eventually, to generate international legal responses to these movements. It is also important to bear in mind that whatever Wilson’s intentions, and however vague his formulations, his concept of self-determination helped to legitimize the prevailing nationalist principle in world politics, and set the stage for international law’s attempts to grapple with that principle by becoming more receptive to nationalist claims. But at the same time, as will be explained below, unlike Lenin’s formulation Wilson’s version of self-determination was fit for empire.

The contrast between Wilsonian self-determination and what might be called Leninist self-determination is revealed to be nuanced and complex. Wilson’s version included the right of *some* nations to decide their own sovereignty. The purported aim was to accord the utmost satisfaction to national aspirations. Lenin’s version was primarily concerned with his own ideological and political objectives and historical necessity rather than issues of identity or minority group status *per se* - the aim being to create an alliance of proletarians for the eventual overthrow of capitalism. Wilson’s self-determination “required that peoples of each state be

³⁸ *President Wilson’s Address to Congress, Analyzing German and Austrian Peace Utterances*, <<http://www.gwpda.org/1918/wilpeace.html>> accessed 06/01/2016.

³⁹ Michla Pomerance, *supra* n. 37, 22-23.

⁴⁰ Antonio Cassese, *supra* n. 12, 20-21.

granted the right to freely select state authorities and political leaders”⁴¹ whereas Lenin’s self-determination did not, or at least not directly. On the other hand, Lenin’s theoretical account of self-determination applied to all peoples whatever their level of development. It had a considerable impact on drives for decolonisation post-World War II. As explained below, Wilson’s self-determination did *not* apply to colonial peoples.

Both versions of self-determination could be, and indeed were, instrumentalised and bent to suit the needs of each rival power. From the perspective of the West, self-determination was loudly demanded on some occasions and ignored or used as a justification for oppression when the consequences of self-determination would have been detrimental to the interests of the power in question (see below on the mandates system). In the case of the USSR, promises of independence were instrumental in securing support for the Russian Revolution⁴² and self-determination was, in substantial part, subordinated to the main goal of the international proletarian revolution. Self-determination was also part of what Bowring refers to as the later USSR’s “schizophrenic” role after Lenin’s death, whereby “self-determination movements were ruthlessly repressed both within the USSR and its sphere of interest,”⁴³ whilst “huge diplomatic and material resources were directed to the anti-colonial and national liberation movements...”⁴⁴ which would put dynamite under the European empires. It is hard to avoid the conclusion that self-determination was, among other things, a potent weapon in the hands of self-interested great powers.

Since the historical development of self-determination is not limited to the quarrel between Lenin and Wilson, the next thing to consider is the way in which international law actually dealt with the national question in the post-World War I peace settlements as the Paris Peace Conference sought to reconstruct Central and Eastern Europe from the ashes of the collapsed multinational empires, and the impact that this had on modern approaches to self-determination. The discussion will then turn to self-determination in the former colonies of the vanquished powers, and explain how self-determination was instrumentalised to maintain imperialism.

⁴¹ *Ibid.*, 19.

⁴² Lea Brilmayer, ‘Secession and Self-Determination: A Territorial Interpretation’ 16 *Yale Journal of International Law* (1991) 177, 181.

⁴³ Bill Bowring, *supra* n. 31, 115.

⁴⁴ *Ibid.*

2.5 *The post-World War I settlements and the lasting impact on international law*

Whatever the vagaries and contradictions of Wilsonian self-determination, attempts were made in the aftermath of World War I to give effect to the principle of nationalities. Although the application of the principle was uneven⁴⁵ and frequently subordinated to the victors' geopolitical, economic and strategic interests⁴⁶ it undoubtedly had some liberatory effects. Tooze, describing the year 1919 as “a truly post-colonial moment” in Europe, notes the following:

“Never before in Europe’s long history of territorial rearrangement had such careful consideration been given to squaring both general principles of justice and the imperatives of power with complex territorial realities. Never before had the interests of different national and ethnic groups. . . been so carefully weighed in the balance.”⁴⁷

The post-war settlements, which took as their task the reconstruction of several collapsed empires, were part of a general reorientation of international law in a manner responsive (but not subservient) to the principle of nationalities. For Berman, this “inaugurated an intellectual revolution in international legal history”.⁴⁸ This “modernist break” in international law involved the rejection by international lawyers of two important legacies of the nineteenth century, namely statist positivism, with the idea that any non-state entity was denied formal legal status, and liberal nationalism, which viewed the nation, rather than the state, as the proper foundation of international law. Their efforts to give nationalism a place in the new international law was complicated by their loss of faith in both liberal nationalism *and* statist positivism.⁴⁹ Clearly, since national passions were one of the major sources of the war, they had to be taken into account; but at the same time, since they were so destructive, they could not form the new foundation of a truly stable international legal order.

⁴⁵ See, for example, the cession of South Tyrol to Italy.

⁴⁶ Antonio Cassese, *supra* n. 12, 25.

⁴⁷ Adam Tooze, *The Deluge: The Great War and the Remaking of Global Order* (Penguin 2014), 282.

⁴⁸ Nathaniel Berman, ““But the alternative is despair”: European nationalism and the modernist renewal of international law” 106 *Harvard Law Review* (1993) 1792, 1794-95.

⁴⁹ *Ibid*, 1801.

For these interwar lawyers, the answer was to “[bypass] the dichotomy between statist positivism and liberal nationalism in favour of a simultaneous affirmation of the autonomy of international law and an openness to the vital forces of nationalism”.⁵⁰ Before World War I, the general idea was that the strongest would conquer territory and neither the consent of the population nor the objective features of their ethnic identity were relevant to the cession of territory. With the advent of self-determination, the balance of power was supposed to be replaced with a *community* of power through which the subjective wishes of the population or their objective features had to be given effect.⁵¹ In the end, all three principles were taken into account: the conquest principle, objective self-determination, and subjective self-determination.⁵² It is clear that the post-war settlements did not simply reverse the standard progression from state to nation, or overturn statist positivism in favour of the principle of nationalities.

One instructive example of this complex arrangement concerns the provisions of the Versailles Treaty pertaining to Poland. Article 88 of the treaty provided that the inhabitants of Upper Silesia “will be called upon to indicate by a vote whether they wish to be attached to Germany or Poland.” This implements a form of *subjective* self-determination. Article 91 established that “German nationals habitually resident in territories recognised as forming part of Poland will acquire Polish nationality *ipso facto* and will lose their German nationality.” Berman points out that this provision “enshrined the traditional rule that citizenship follows cession” since German nationals “automatically underwent a change of citizenship by virtue of the territorial cession to Poland”.⁵³ Article 91 also stated that a certain category of German nationals would not acquire Polish nationality without special authorization of the Polish state, which “augmented Poland’s sovereign power in apparent recognition of the new state’s foundation upon the ‘Polish nation’”.⁵⁴ Finally, Article 91 provided a right to opt for Polish nationality to “Poles who are German nationals over 18 years of age and habitually resident in Germany,” which draws a link between ethnic and state nationality and implements elements of *objective* self-determination. Berman concludes:

⁵⁰ *Ibid*, 1803.

⁵¹ Erez Manela, *supra* n. 51, 23.

⁵² *Ibid*, 142.

⁵³ Nathaniel Berman, *supra* n. 48, 1830.

⁵⁴ *Ibid*, 1831.

The collapse of the multinational imperial states under nationalist pressure did not reveal a transparent new order based on nations; on the contrary, the old order gave way to a murky situation marked by a tangle of national and state identities, a situation that called for increased *international* authority.⁵⁵

The legal significance of the principle of nationalities was limited to the process of state formation. For example, the Permanent Court of International Justice's Advisory Opinion in the *Polish Nationality* case⁵⁶ clearly rejected the contention that the Polish state, founded to a considerable extent on the principle of nationalities, was competent to refuse to extend Polish nationality to swathes of former German nationals based on an apparent ambiguity in the Minorities Treaty. Thus, as Berman points out, "the fact that the creation of the Polish state was due to the implementation of the principle of nationalities did not, for the court, grant international legal protection for an ongoing process of de-germanification," and international law's recognition of national aspirations "did not signify that international law's erstwhile subservience to sovereigns would now be replaced by its subservience to nations, whether or not constituted as states".⁵⁷ Instead, a new autonomous legal order was created that both deprived the state of the privileged legal position reserved to it by statist positivism and gave effect to the principle of nationalities whilst channelling it into certain forms and attempting to control it.

2.6 *The Mandates System*

Before he began to expound the benefits of self-determination during World War I, Wilson had been a vocal critic of those who opposed the American annexation of the Philippines, arguing that "It was America's duty to govern the Philippines for the advancement of the native population, and it could not shirk it."⁵⁸ This argument was supported by the promise that the Filipinos must eventually decide their own futures, but only after a period of supervision under the United States' benign tutelage. Incidentally, this was not the last time that Wilson suggested

⁵⁵ *Ibid*, 1841.

⁵⁶ PCIJ, *Question Concerning the Acquisition of Polish Nationality* (1923).

⁵⁷ Nathaniel Berman, *supra* n. 48, 1840.

⁵⁸ Erez Manela, *supra* n. 33, 29.

a link between imperialism and self-determination. He also stated that the Monroe Doctrine was justifiable as a defence of the self-determination of the Americas.⁵⁹ Although President Wilson characterised the Monroe Doctrine as “the first effective dam built upon against the tide of autocratic power”⁶⁰ his future Secretary of State, Robert Lansing, more honestly described it in the following terms: “In its advocacy of the Monroe Doctrine the United States considers its own interests. The integrity of any other American nations is an incident, not an end”.⁶¹

Wilson was not the first to posit a link between imperialism and self-determination, and he would not be the last. Indeed, the British government took a very similar view in defence of their decision to install a friendly autocrat, King Faisal, in Iraq in order to preserve their sphere of influence. In 1918 Arnold Toynbee, then at the British Political Intelligence Department, argued that Britain should embrace self-determination precisely because it would amount to “a British Monroe Doctrine for Arabia”.⁶² This dual-use version of self-determination, which could be used to reorder territorial boundaries in Europe whilst justifying imperialism elsewhere, found its way into the League of Nations Mandates System. In a clear echo of Wilson’s justification of the US annexation of the Philippines, Article 22 of the Covenant of the League of Nations stated that the colonies and territories lost by the vanquished powers were inhabited by “peoples not yet able to stand by themselves under the strenuous conditions of the modern world” and that “advanced” nations should promote the natives’ well-being and development under a “sacred trust of civilisation”.⁶³ Article 22 of the Covenant essentially proposed that “uncivilized” peoples ought to be tutored by more advanced nations under conditions whereby the interests of the inhabitants themselves would be paramount. The idea of governing these territories in the interests of the populations concerned was reminiscent of the fifth of Wilson’s fourteen points, which called for an “absolutely impartial adjustment of all colonial claims, based upon a strict observance of the principle that in determining all such questions of sovereignty the interests of the populations concerned must have equal weight with the equitable claims of the government whose title is to be determined.” Indeed, Wilson

⁵⁹ Hamilton Foley, *Woodrow Wilson’s Case for the League of Nations* (Princeton University Press 1923), 5.

⁶⁰ *Ibid.*

⁶¹ USA Department of State, *Papers relating to the foreign relations of the United States. The Lansing Papers, 1914-1920: Vol II*, <<https://history.state.gov/historicaldocuments/frus1914-20v02/d281>> accessed 13/07/16.

⁶² Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (OUP 2015), 285.

⁶³ Covenant of the League of Nations, Art. 22.

himself, on his voyage to Paris, suggested that the German colonies should “be declared the common property of the League of Nations and administered by small nations⁶⁴,” and his later drafts included the principle that the populations concerned should be able to petition the League for redress of any breach of the mandate”.⁶⁵ Although Point V might have implied a broader concept of self-determination, Wilson clearly focused his energies on the colonies of the defeated empires. This much was made clear by one of his closest advisers, Colonel House, who remarked that Point V was not intended to reopen all colonial questions; rather it was clearly applicable to the colonial claims created by the war.⁶⁶

The Covenant itself was silent on the question of the ultimate independence of these Mandated Territories, only going so far as to divide the territories and former colonies into three categories: the former Ottoman territories, which were so advanced that their existence as independent nations could be provisionally recognised; former colonies for whom the Mandatory power must be responsible under certain conditions, including an open-door to trade for other Members of the League; and other territories which could “best be administered under the laws of the Mandatory as integral portions of its territory.”⁶⁷ Absent any clear guidance from the Covenant, it was left to the League of Nations Council and the Permanent Mandates Commission (PMC) to work out answers to several complex questions. One of those questions directly concerned the right of self-determination, namely, were the Mandated territories entitled to independence or self-government at some point in the near future?

In her in-depth study of the mandates system, Pederson notes that the PMC and the League of Nations Council retreated from self-determination after coming under the influence of the PMC’s British member, Lugard.⁶⁸ This retreat from self-determination is perhaps most strikingly demonstrated in the PMC’s response to the French bombing of an uprising in Damascus, which even some within the West had come to see as “a war of national liberation against an occupying power.”⁶⁹ Pederson demonstrates that in the course of its investigation into the affair, the PMC’s aim was to “enlist the great powers in a drama of public

⁶⁴ David Hunter Miller, ‘The Origin of the Mandates System’ *Foreign Affairs* (1928) 277, 281.

⁶⁵ *Ibid*, 282.

⁶⁶ Colonel House, *Interpretation of President Wilson’s Fourteen Points*, <<https://www.mtholyoke.edu/acad/intrel/doc31.htm>> accessed 29/11/16.

⁶⁷ *Ibid*.

⁶⁸ Susan Pedersen, *supra* n. 62.

⁶⁹ *Ibid*, 147.

accountability that would legitimate this form of alien rule before a sometimes critical, newspaper-reading, *Western* public,” and that by effectively legitimating French actions in Syria, the PMC had drawn back from self-determination and “it would be in retreat from self-determination ever after”.⁷⁰ The PMC took a similar approach in its response to a petition from virtually the entire male population of Western Samoa claiming that the people of Western Samoa were ready for independence and objecting to New Zealand’s rule. In Pedersen’s words:

“The Samoans’ principal complaint was that they were being governed autocratically and wished to govern themselves, but since they were defined by the Covenant as not yet capable of self-government their complaint fell outside the Commission’s jurisdiction. *Alien administration was the essence, and not a violation, of the mandates system. It was the claim to capacity that was inadmissible.*”⁷¹

The above demonstrates that although the rhetoric of self-determination was capable of providing justifications for imperialism and colonialism (the claim was that ‘backwards’ people needed to be tutored by advanced nations because they were not *yet* able to stand by themselves, but presumably might be able to at some unspecified point in the future, once they had been sufficiently tutored⁷²), the reality is that this was a cloak used to hide the fact that Wilsonian self-determination –the right to choose one’s own sovereignty – did not apply to the Mandate Territories, just as it did not apply to colonial possessions. Wilsonian self-determination was, as Getachew puts it, “a racially differentiated principle, which was fully compatible with imperial rule.”⁷³

Future colonies therefore faced several struggles on the international legal plane. The first was to obtain the right of self-determination, and the second was to dismantle what Reus-Smit calls the “external institution” of empire, which he describes as “a set of intersubjective beliefs and attendant social practices that established empire in general as a legitimate form of rule”.⁷⁴ The

⁷⁰ *Ibid*, 168.

⁷¹ *Ibid*, 185.

⁷² Indeed, the ICJ noted in the 1971 *Namibia* case that there was “little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.” See: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971 16, para. 53.

⁷³ Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination* (Princeton 2019), 40.

⁷⁴ Christian Reus-Smit, *Individual Rights and the Making of the International System* (CUP 2013), 156.

experience of the Mandated Territories provided ample evidence that obtaining the right of self-determination would not be sufficient if its concrete application could be postponed by the claim, and the attendant belief, that colonial peoples needed to be tutored before they could stand on their own two feet. But even then, the decolonization movements were perfectly well aware that seizing the political form of the nation-state was only the first step in an ambitious project to remake an unjust global order.⁷⁵

2.7 *The Åland Islands question*

In July 1920, the Council of the League of Nations adopted a resolution establishing an International Commission of three jurists for the purpose of ascertaining whether the Åland Islands dispute should be left to the domestic jurisdiction of Finland. The dispute concerned the wishes of a majority of Åland Islanders to be incorporated into the Kingdom of Sweden. Self-determination was at the core of the Åland Islands dispute because the Islanders and Sweden both claimed that since Finland had been able to exercise its will by separating itself from Russian sovereignty, *mutatis mutandis* the Åland Islands should be able to separate themselves from Finland.

Both the International Committee of Jurists and the Commission of Rapporteurs (which was later called upon to present some recommendations to the Council) concluded that self-determination was not yet a rule of international law and that the disposition of national territory remained an attribute of the sovereignty of every state.⁷⁶ But the jurists also pointed out that there were certain abnormal situations – such as the “formation, transformation and dismemberment of states as a result of revolutions and wars”⁷⁷ – in which these considerations might not apply. Such situations could not be confined purely to the domestic jurisdiction of the state concerned because “this transition interests the community of States very deeply both from political and legal standpoints.”⁷⁸ Under such circumstances, the jurists suggested, the principle of self-determination may be called back into play. Since the situation in the present

⁷⁵ Adom Getachew, *supra* n. 73.

⁷⁶ *Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Åland Islands question*, <<https://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf>> accessed 08/01/2016.

⁷⁷ *Ibid.*, para. 3.

⁷⁸ *Ibid.*

case was sufficiently abnormal to fall outside the remit of the normal rules of positive law, the jurists took the view that this was an international dispute, and continued to discuss the principle of self-determination.

Both reports emphasised the linkage between self-determination and the rights of minorities. The jurists pointed out that “both have a common object – to assure to some national Group the maintenance and free development of its social, ethnical or religious characteristics,”⁷⁹ and the rapporteurs pointed out that:

“The ideas of justice and liberty, embodied in the formula of self-determination, must be applied in a reasonable manner to the relations between States and the minorities they include. It is just that the ethnical character and ancient traditions of these minorities should be respected as much as possible, and that they should be specially authorised to practice freely their religion and to cultivate their language.”⁸⁰

Both reports maintained a clear distinction between self-determination, which was confined to its external aspects (concerning the allocation of sovereignty), and minority rights (which were, according to the jurists’ report, another principle characterizing liberty at the time) whilst emphasising the links established by their common objectives. In the rapporteurs’ view, these links were so firm that if Finland had refused to grant certain suggested guarantees to the Islanders, which were aimed at the preservation of their culture and language, then “The interests of the Ålanders, the interests of a durable peace in the Baltic, would then force us to advise the separation of the islands from Finland, based on the wishes of the inhabitants...”

The rapporteurs viewed the Swedish-speaking Åland Islanders as a “small fraction of the Finnish nation” and therefore a “small fraction of a people,”⁸¹ though they also recognised the relevance of their close cultural ties with the Swedish-speaking population of Finland. This formula provided one of the reasons why the Islanders were unable to claim that they were as entitled to determine their own fate as was Finland when it gained its independence from Russia.

⁷⁹ *Ibid.*

⁸⁰ *Report presented to the Council of the League of Nations by the Commission of Rapporteurs*, <<https://www.ilsa.org/jessup/jessup10/basicmats/aaland2.pdf>> accessed 08/01/2016.

⁸¹ *Ibid.*, 3.

It is possible to trace in the Åland Islands case the emergence of the modern idea that external self-determination (loosely defined as the right of a people to choose its own sovereignty) is ordinarily exercisable by the entire population of a state whilst internal self-determination, which overlaps with various minority rights and human rights guarantees, may be exercisable by sub-state groups. It is also possible to trace the modern idea that self-determination contains remedial elements designed to offset the negative effects of nation-state building on minority groups. Finally, it is worth noting that the rapporteurs did not see the Islanders' position as a small fraction of a people as an impediment to their ability to suggest internal reforms or, in the case of Finland's failure to implement those reforms, the incorporation of the Åland Islands with the Kingdom of Sweden. In Berman's terms, the Jurists and Rapporteurs "each constructed a modernist vision of the new international law" simultaneously open to the "elemental forces of nationalism" and "newly authorised to develop its own specifically legal capabilities, and freely juxtaposing heterogeneous conceptions".⁸²

2.8 *Decolonisation and the shift from principle to universal right*

In the 26 years that followed the end of the Second World War, Europe's territorial empires collapsed and 76 new sovereign states were created.⁸³ This process of decolonisation would prove to be the driving-force behind the reconceptualization of self-determination, just as self-determination was one of many factors contributing to the downfall of that particular form of colonialism.

The Atlantic Charter affirmed the principle of self-determination in its Wilsonian sense, declaring that territorial changes would have to accord with the freely expressed wishes of the peoples concerned and that all peoples should be free to choose the form of government under which they will live. But it also affirmed the logic of the Mandates system by declaring that both countries would seek to further the enjoyment by all states of equal access to the trade and raw materials of the world. The UN Charter declares in Article 1 that one of the purposes of the UN is to develop friendly relations among nations based on respect for the principle of self-

⁸² Nathaniel Berman *supra* n. 48, 1873.

⁸³ Christian Reus-Smit, *supra* n. 74, 151.

determination and equal rights. Article 55 similarly places self-determination into the context of creating and maintaining friendly relations among nations. The UN Charter therefore seems to envisage self-determination as little more than the corollary of state sovereignty and territorial integrity. As Higgins aptly points out, “In both Article 1(2) and Article 55, the context seems to be the rights of the peoples of one state to be protected from interference by other States or governments.”⁸⁴

The Charter also made provisions for territories that remained under the former League of Nations Mandates system, along with territories detached from enemy states as a result of the Second World War and territories voluntarily placed under this category. The Mandates system was replaced with an international Trusteeship system under Chapter XII of the Charter, but the objectives of the new system remained broadly similar to the old one. The inhabitants of the trust territories were to be advanced politically, economically, socially and educationally, thus maintaining the old discourse of backwardness and the necessity of a civilizing mission. One of the basic objectives of the system was the progressive development of the trust territories towards self-government or independence at some unspecified point in the future, thus maintaining the old purported *raison d'être* of the Mandates system. Similar provisions are made for non-self-governing territories, with the notable absence of any express reference to the eventual independence of these territories.

The beginnings of a tangible shift in international law's approach to colonization and self-determination cannot therefore be found in the UN Charter. Nor can it be found in the Universal Declaration of Human Rights, which says nothing about self-determination but does recognise the validity of the Trusteeship system. Instead, it must be traced back to the decision in 1951 by a group of post-colonial states such as India, Iraq, Syria and the Philippines to propose that the General Assembly insert into the draft human rights covenant an article on the right of peoples to self-determination. The post-colonial states proposed that the draft article should be written in the following terms: “All peoples shall have the right of self-determination.”⁸⁵ The proposed right would also stipulate that States having responsibility for non-self-governing territories should “promote the realization of that right in relation to the peoples of such

⁸⁴ Rosalyn Higgins, *Self-Determination and Secession in Themes and Theories: Selected Essays, Speeches and Writings in International Law* (OUP 2009).

⁸⁵ *Year Book of the United Nations* (1951), 486.

Territories.”⁸⁶ Those supporting the draft resolution emphasised the importance of self-determination to international peace and security and argued that it is the *sine qua non* of human rights protection. Those opposing the resolution - including Turkey, France and Belgium - did not oppose the principle of self-determination as set out in the Charter but advanced several technical and legal arguments against the proposal that it should become a part of the human rights covenant. Despite the opposition of colonising states, the draft resolution was passed by 36 votes to 11 with 12 abstentions and became General Assembly Resolution 545. The following year, the General Assembly adopted Resolution 637, which recommended that States Members of the UN should promote the realization of the right of self-determination of the people of Non-Self-Governing and Trust Territories and that they should have regard to the wishes of the people of those territories. The years immediately following the adoption of these Resolutions produced a slew of General Assembly Resolutions attempting to catalyse the self-determination process. For example, Resolution 558 invited the Administering Authority of each Trust Territory other than Somaliland to include in their annual reports information in respect of “The measures taken, or contemplated, which are intended to lead the Trust Territory, in the shortest possible time, to the objective of self-government or independence” and, more specifically, “The period of time in which it is expected that the Trust Territory shall attain the objective of self-government or independence.”

The greatest stride in terms of decolonisation and the reconceptualisation of self-determination came with the admission to the General Assembly of 17 newly independent states during its fifteenth session. General Assembly Resolution 1514, which was adopted by 89 votes to 0 with 9 abstentions, was introduced in draft form by Cambodia on behalf of 26 Asian and African countries, and was eventually sponsored by 43 states.⁸⁷ The Resolution’s drafters had been concerned about the slow progress of decolonisation; a concern conveniently highlighted by the arguments against the draft Declaration advanced by the UK, Australia and New Zealand. These states continued to cling to the rationale of the Mandates system by asserting that “colonialism was a necessary transitional phase” and, in terms of the eventual self-determination of Non-Self-Governing Territories, “Each case was governed by its own circumstances, and the test was always that of determining what would best suit the interests

⁸⁶ *Ibid.*

⁸⁷ *Year Book of the United Nations* (1960), 46.

of the peoples whose destiny was at stake”.⁸⁸ The Resolution’s drafters were also concerned about the fact that former colonies tended to achieve a reduced form of sovereignty when they eventually obtained their independence⁸⁹, and they therefore emphasised the importance of economic freedom as well as political freedom.

Resolution 1514 is significant for many important reasons. First, it declared that “The subjection of peoples to alien subjugation, domination and exploitation” constituted a denial of fundamental human rights. Second, it declared that immediate steps had to be taken to transfer all powers to Trust and Non-Self-Governing territories “in accordance with their freely expressed will and desire.” Finally, it declared:

“All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

It is important to note that the Resolution expressly repudiated the logic of the Mandates system by declaring, immediately after the paragraph on self-determination, “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.” A later General Assembly Resolution sought to provide guidance on what was meant by a colonial or Non-Self-Governing territory in the context of the duty, contained in Article 73e of the UN Charter, to transmit information pertaining to the conditions in such territories. Resolution 1541 provides that *prima facie* there is an obligation to transmit information pertaining to territories that are geographically separate and distinct ethnically and/or culturally from the administering country. The presumption in favour of transmission is also bolstered by evidence that the territory is arbitrarily in a position of subordination to the metropolitan state. These Non-Self-Governing territories were entitled to the benefits of self-determination, and its application could not be postponed by reference to the assertion that certain colonized peoples were insufficiently advanced. Resolution 1541 added that these Non-Self-Governing Territories could achieve a full measure of self-government by emergence as

⁸⁸ *Ibid*, 47.

⁸⁹ This is what Anghie refers to as the “economization of sovereignty”; see Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004), 156-7. The point is also made by Pedersen, who points out that the Mandates system drove a wedge between political and economic sovereignty and posed the question of whether such forms of governance would become normative; see Susan Pedersen, *supra* n. 62, 260.

a sovereign state, free association with an independent state, or integration with an independent state. The emphasis was on the free choices of the self-determining units and the democratic processes leading to those free and voluntary choices. As Higgins correctly observes, self-determination was never restricted to a choice for independence.⁹⁰

2.9 *Self-determination re-conceptualised as a territorial entitlement*

As noted above, the principle of self-determination as applied post-World War I was capable of reaching across territorial boundaries and using the concept of nationhood as the foundation of new states, particularly in Europe. But self-determination post World War II took a different form. As Reus-Smit points out, “The idea that ethnically defined nations had a right to sovereign statehood, and that granting this right would enhance international peace and security, was shattered by Hitler’s genocidal war for an ethnically homogenous greater Germany”.⁹¹ The problem was that the interwar attempt to make state frontiers coincide with nationalities and languages eventually led to the mass expulsion or extermination of minorities, or what Hobsbawm referred to as the “*reductio ad absurdum* of nationalism in its territorial version”.⁹² In the end, self-determination was reconceptualised as a territorial entitlement, rather than a purely national one. This territorial reconfiguration is illustrated by the way in which the right of self-determination, proclaimed by the General Assembly without any opposing votes in its adoption of Resolution 1514, was applied in the context of the African colonies. In 1964, the Organisation of African Unity adopted a resolution on border disputes. The resolution noted that the European expansion in Africa imposed arbitrary territorial boundaries between African tribes, but decided that after independence “it soon became clear that the best policy was to confirm colonial boundaries in principle and thus give priority to the avoidance of disputes and threats to the peace in Africa.”⁹³ This is the principle of *uti possidetis juris*, the essence of which lies in its primary aim of securing territorial boundaries at the moment of a new state’s independence.⁹⁴ In the context of decolonisation in Africa, those

⁹⁰ Rosalyn Higgins, *supra* n. 84.

⁹¹ Christian Reus-Smit, *supra* n. 74, 174.

⁹² Eric Hobsbawm, *supra* n. 17, 133. Hobsbawm argues that Hitler was “a logical Wilsonian nationalist.”

⁹³ O.A.U. *Resolution on Border Disputes, 1964* in Ian Brownlie, *Basic Documents on African Affairs* (OUP 1971), 360.

⁹⁴ *Frontier Dispute*, Judgment, I.C.J. Reports 1986 554, 566.

territorial boundaries took the form of internal administrative lines that had been imposed by the colonisers.

In its judgment in the *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, the ICJ noted that *uti possidetis*, as a principle that upgraded administrative delimitations to the status of international frontiers, was not only applicable in the African context, rather it was a “principle of a general kind which is logically connected with this form of decolonisation wherever it occurs”.⁹⁵ Furthermore, it is relatively clear that the clash between *uti possidetis* and self-determination produced a synthesis whereby self-determination came to be applicable to territorial units rather than other potential candidates, such as ethnic groups. This will be considered in more detail in Part II.

Whichever way one looks at it, after becoming the engine of decolonisation and entering the human rights corpus via the two international covenants, the right of self-determination became a territorial entitlement. For example, in Resolution 32/34 on the question of East Timor, the General Assembly reaffirmed the right of “the people of East Timor” to self-determination; and in Resolution 3292 on the question of Spanish Sahara, the General Assembly reaffirmed the right of the “population of Spanish Sahara” to self-determination in accordance with Resolution 1514. On the other hand, Biafra and Katanga could not rely on the right of self-determination in their attempts to secede from existing African states. Once new states were formed on the basis of colonial boundaries, the appropriate unit of self-determination was coterminous with the boundaries of the state. More recent examples of this territorial reconceptualisation of self-determination will be considered in the Part II.

Whereas the interwar period witnessed attempts to embroider the principle of nationalities and the state into a newly autonomous international law and, to some extent, implemented the idea that the state should be coterminous with pre-existing nations; the post-World War II period witnessed a shift away from *national* self-determination.

2.10 Decolonisation and internal self-determination

⁹⁵ *Ibid.*

The early UN period also witnessed a marked reluctance to tackle issues of minority protection. This lack of concern with the fate of minority groups went hand-in-hand with a limited concept of self-determination which, while it was eventually shorn of its racialized sphere of application, had very little to say about self-determination after the moment of decolonization. The new postcolonial states were intensely focused on building strong centralised political structures in order to effectively remake a deeply unequal *international* order which made the achievement of meaningful self-determination at home all but impossible, and they saw discontent among domestic minority groups as a destabilising threat to that important project.⁹⁶ There was therefore little trace of what we now call *internal* self-determination. In fact, as Senaratne has shown, the notion that self-determination has continuing relevance *internally* gained traction mainly among Western international lawyers towards the *end* of the formal decolonisation process.⁹⁷ The idea was that Western countries were concerned with democracy, human rights and freedom; while Third World and socialist countries cared only for independent statehood and misused their sovereignty internally. This was arguably part-and-parcel of the ideological Cold War confrontation between the West on one side, and socialism (real or professed) and Third World nationalisms on the other. As Moyn puts it, international law's focus on the inner workings of state sovereignty had to wait until self-determination in the form of decolonisation entered crisis:

“Once, skepticism about human rights in the guise of anticolonialist self-determination had reigned. Soon, enthusiasm for human rights as a potential interference in sovereign jurisdiction took its place”.⁹⁸

During the Cold War and in its immediate aftermath, however, internal self-determination was largely conceptualised as an emergent or emerging entitlement to representative government and majoritarian democracy.⁹⁹ It was only with the collapse of Yugoslavia and the post-Cold War upsurge in ethnic conflict that minority rights gained traction, and the links between self-determination and minority rights began to be taken more seriously. These links will be considered in detail in Chapter Four.

⁹⁶ Adom Getachew, *supra* n. 73.

⁹⁷ Kalana Senaratne, ‘Internal Self-Determination in International Law: A Critical Third-World Perspective’ 3 *Asian Journal of International Law* (2013), 305.

⁹⁸ Samuel Moyn, *The Last Utopia: Human Rights in History*, (Harvard University Press 2010), 208.

⁹⁹ T.M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *The American Journal of International Law* (1992), 46.

2.11 Conclusion

Self-determination was raised to the level of a key principle of international affairs during World War I as the newly emerged Soviet Union and the United States jostled over its meaning. For Lenin, the principle entailed a right of nations to secede from their host states in the interests of proletarian internationalism, and this principle was (briefly) put into practice in the Soviet Peace Treaties of 1920. It also meant that colonised peoples had the right to independence. For Wilson, the principle entailed opposition to autocratic governance and the idea that the new boundaries and states of Europe ought to track the principle of nationalities. But Wilson's self-determination was also a racially differentiated principle which was capable of legitimising colonial rule elsewhere.

Although the principle of self-determination after World War I was capable of application beyond and across existing territorial boundaries, the right of self-determination that emerged from the decolonisation struggles only applied to territorial units. It did not apply internally, to minority groups, even as Western international lawyers sought to develop a limited internal dimension to the right which focused on majoritarian liberal democracy. Whereas post-World War I self-determination was open to the principle of nationalities and sought to embroider that principle into a newly autonomous international law through myriad complex responses to the creation of new states, the post-World War II concept of self-determination largely closed the door on the principle of nationalities. Rather than empowering minority groups like the Kurds, self-determination helped to consign the nations of Africa, for example, to a similar position of weakness. Like the Kurds, these groups became invisible nations¹⁰⁰. In the words of Makau Matua:

“...Self-determination is linked to the administrative units established by the imperial powers. Such linkage validates the colonial state, retroactively ratifies colonial borders, and sanctions the denial of sovereignty to pre-colonial state-societies. This contrived

¹⁰⁰ Robert H. Jackson, *Juridical Statehood in Sub-Saharan Africa*, 46 *Journal of International Affairs* (1992) 1.

state is beset by a multitude of problems, many of them a result of the nature of its conception and creation.”¹⁰¹

Whether this was a double-standard or an unavoidable necessity, the fact is that international law allocated sovereignty, and continues to *recognise* sovereignty, in particular ways; and this creates a whole range of problems for particular minority groups. The obvious question that arises from this historical observation is: how, if at all, can the right of self-determination, and international law more broadly, be used to rectify these problems?

The next section will focus on contemporary developments in the right of self-determination. The broad purpose is to identify self-determination’s relationship with sovereignty in order to develop a legal framework within which the Kurdish Question can be discussed. Within that broad purpose, it will be considered whether the Kurds can take advantage of a remedial right to secede from Turkey conditional on grave human rights abuses. Having outlined a position on *external* self-determination, Chapter Four will develop a framework of *internal* self-determination within which some key aspects of the Kurdish Question can be approached.

¹⁰¹ Makau Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 *Michigan Journal of International Law* (1994) 113, 1142.

PART II

**CONCEPTUALISING THE RIGHT OF
SELF-DETERMINATION**

CHAPTER THREE

3 Self-Determination and Secession

Having charted the historical development of the right of self-determination in the previous chapter, this chapter focuses on the relationship between the contemporary right and the unilateral secession of sub-state groups. The aim is to show that the legal right of self-determination—which is contained in common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—does not entail a right of sub-state groups, of whatever character, to unilaterally form new states out of portions of existing states. The chapter will begin by outlining two prominent theories of secession before examining relevant international instruments and state practice in order to show that neither theory has a strong basis in international law. The right of self-determination, it will be argued, does not entail a *right* of secession but at the same time international law leaves open a very limited *freedom* to secede.

3.1 *Theories of secession*

For the purposes of this chapter, secession is more than the formation of a new political unit on the territory of an existing state. By ‘secession’, I refer exclusively to *unilateral* secession, which involves the repudiation by a sub-state group of the state’s sovereignty over a particular piece of territory and the attempt to establish a new sovereign state on that piece of territory, or to incorporate that piece of territory into another state. Whether or not the new state is recognised by the international community is technically a separate issue (although it will be seen that the question of state recognition is closely linked to the purported right of secession). The crucial point is that the secession takes place without the consent of the affected state.

The question is: does the right of self-determination of peoples entail a right of secession? Such a right would entail two things. First, that the sub-state group has a right to attempt to establish a new state. Second, that other states are obligated not to interfere with the attempt.¹

¹ Allen Buchanan, *Justice, Legitimacy and Self-Determination* (OUP 2004), 333-334.

On this reading, the purported right of secession can be understood as a liberty-right (in that it concerns what the right holding peoples are entitled to do or not to do), and a negative claim-right *in rem* (in that the right entails a corresponding duty on other states not to interfere in the exercise of the liberty-right).²

Theories of secession can be divided into two broad categories. The first category views secession as a *primary right* – that is, a non-contingent right that may be exercised by all “peoples” at all times. The second category views secession as a *remedial right*, or a right contingent upon evidence of gross human rights violations attributable to the state.³

3.1.1 *Primary right theories*

Primary right theories can be subdivided into *ascriptivist* and *plebiscitary* theories.⁴ Ascriptivist theories hold that the self-determining “peoples” are defined by ascriptive characteristics such as ethnicity, and that such “peoples” have the right to secede without more. This theory suggests a world divided into states based on ethnicity, language, or other similar attributes—though the possession of a *right* to secede is obviously not the same thing as an *obligation* to secede, and it is never possible to create perfectly homogenous states because ethnicity and language are elusive and constantly shifting concepts. Recall, for example, that the Kurdish language consists of many different dialects, and whether or not those dialects in fact amount to separate languages is difficult to determine and depends on how one chooses to draw the boundary between language and dialect. Even the most ascriptive theory of secession will therefore rely on some degree of subjectivity on the part of the decision maker.

Plebiscitary theories, on the other hand, hold that if a majority of persons residing in a particular portion of a state’s territory make a democratic choice to secede then they have a right to do so. As Buchanan points out, this theory does not require the secessionists to be a distinct nation or ethnic group.⁵ It does, however, leave one with the problem of determining the appropriate *locus* of democracy. For example, if one chose to focus on territory in the North-eastern corner of Iraq and held a plebiscite in that region, there is little doubt that the Kurdish majority would

² For more on this categorization of rights see Peter Jones, *Rights* (MacMillan Press 1994), 14-22.

³ Allen Buchanan, *supra* n. 1, 350.

⁴ *Ibid*, 352.

⁵ *Ibid*, 353.

vote to secede from Iraq. If, however, one held a plebiscite across the entire territory of Iraq then the result would be quite different. Indeed, a survey of Iraqi attitudes conducted in August-September 2015 found that 82% of Iraqi Kurds think that Kurdistan should become an independent country, but 60% of the overall population think that Kurdistan should remain an autonomous region of Iraq.⁶ Plebiscites can often ground any desired outcome, provided the locus of the plebiscite is chosen accordingly. The plebiscitary theory therefore gets caught up in debates about the primacy of the state. Should one assume that truly democratic choices must be majoritarian choices made by the population of entire states, or is there a case for saying that decisions made at the local level tend to be more legitimate than decisions taken at the national level? The problem is highlighted by Dahl, who points out that “The majority principle itself depends on prior assumptions about the unit: that the unit within which it is to operate is itself legitimate and that the matters on which it is employed properly fall within the jurisdiction of that unit”.⁷ In the end, plebiscitary theories cannot be grounded in democratic theory alone because democratic theory *presupposes* the rightfulness of the democratic unit. As Dahl puts it, “to make a reasonable judgment about the scope and domain of democratic units requires us to move well beyond the realm of theoretical reason and deep into the realm of practical judgment”.⁸ The appropriate *demos* is therefore context-dependent and cannot be conclusively presumed through abstract reasoning (although theory might provide a more-or-less workable set of criteria for judging whether a claim as to the appropriate *demos* is justified in a particular case⁹). In some cases, the state, defined as a territorial whole, might be the most appropriate *demos* for a plebiscite. In others, a particular segment of the state’s population or territory might be the more appropriate *demos*.

The difficulty involved in trying to articulate the link between *demos* and self-determination is illustrated quite strikingly in the case of Northern Ireland, where competing self-determination claims between Catholics and Protestants were underwritten by competing conceptualisations of the most appropriate self-determination unit. For the Irish Nationalists, it was the whole territory of the island of Ireland as a whole; for the Irish Unionists it was the northern territory as part of a United Kingdom.

⁶ Greenberg Quinlan Rosner Research, *Lack of Responsiveness Impacts Mood*, <https://www.ndi.org/files/August%202015%20Survey_NDI%20Website.pdf> accessed 26/04/16.

⁷ Robert Dahl, *Democracy and its Critics* (Yale University 1989), 204.

⁸ *Ibid.*, 207.

⁹ See, for example, Dahl’s seven criteria at *ibid.*

In practice, there is likely to be a significant degree of overlap between ascriptivist and plebiscitary theories. An ethnically defined “people” must somehow express their will to secede (usually via plebiscite). And conversely, the prior choice about the most appropriate *demos* in which to hold a legitimate plebiscite is likely to take into account the territorial concentration of ethnic groups—particularly where the aim is to end ethnic conflict.

3.1.2 Remedial right theories

In contrast, remedial right theories hold that secession cannot be claimed as a right merely because the peoples concerned are a defined ethnic group or because they have made a democratic choice to secede. Instead, secession should be seen as an *ultima ratio* in cases where a group’s human rights are being gravely violated, or where the government does not represent all of the people without distinction, or possibly where the state persistently violates intrastate autonomy arrangements. Fisch prefers to think of remedial secession as the “punishment thesis” because, in his view, remedial right theories are grounded in the oppression suffered by the seceding entity: its secession is a reward or compensation for the suffered oppression, whereas the offending state is punished for its behaviour by being made to surrender its sovereign rights over a particular piece of territory.¹⁰ On the other hand, Buchanan prefers to think of remedial right only theories in terms of the right of self-defence. In his view, “When the only alternative to continuing to suffer these injustices is secession, the right of the victims to defend themselves voids the state’s claim to the territory and this makes it morally permissible for them to join together to secede”.¹¹

3.2 Primary right theories—a critique

As noted above, primary right theories, whether in their plebiscitary or ascriptive forms, are usually understood to require one to identify the self-determining “peoples” who possess the right of unilateral secession. Since the right of self-determination only applies to “peoples” for the purposes of common Article 1 of the ICCPR and ICESCR, so the argument goes, it is only

¹⁰ Jorg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion* (CUP 2015), 47.

¹¹ *Supra* n.1 at p. 354.

a group possessing all the characteristics of peoplehood that could ever hope to claim a right to secede. Much energy is therefore dedicated to the task of adding meaning to the word “peoples”, which is thought to carry so much power that a clear definition of it has been carefully avoided by international fora. Indeed, during the drafting of Article 1, suggestions were made during the Commission on Human Rights’ 8th session to the effect that “peoples” should apply to “large compact national groups,” to “ethnic, religious or linguistic minorities,” or to “racial units inhabiting well-defined territories”.¹² In the end, none of those proposals were voted upon and it was thought that the term should remain undefined.¹³ It was also explicitly acknowledged that the rights of minorities were a separate problem of great complexity – a perspective that is expressed in the ICCPR’s distinction between minority rights (Article 27) and self-determination (Article 1).

The problem of identifying the relevant “peoples” is as old as democratic theory, as the root meaning of the ancient Greek term *demokratia* involves a *demos* (people) and *kratia* (rule or authority).¹⁴

3.2.1 *Formal v. substantive definitions of peoples*

One useful way of approaching the concept of peoplehood is to differentiate between formal and substantive definitions. Formal definitions are separate from the object to be defined. They might, for example, define a people according to “geographic-topologic elements or by administrative boundaries established for other reasons long before peoples were even spoken of”.¹⁵ From this perspective, the characteristics of the peoples concerned are not connected to the definition of those peoples. Substantive definitions, on the other hand, are internal to the group to be defined and can contain objective and subjective elements.¹⁶ Objective elements of a substantive definition might include features such as language, ethnicity or religious affiliations. Subjective elements generally refer to the group members’ subjective desire to belong to the group and/or to preserve its characteristics. One clear example of a substantive

¹² Marc J. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights* (Martinus Nijhoff 1987), 32.

¹³ *Ibid.*

¹⁴ Robert Dahl, *supra* n. 7, 3.

¹⁵ Jorg Fisch, *supra* n. 10, 34-35.

¹⁶ *Ibid.*, 35.

definition containing both objective and subjective elements is the influential definition of national minorities formulated by Francesco Capotorti:

“A group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members – being nationals of the state – possess ethnic, religious or linguistic characteristics differing from the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language”.¹⁷

A similar approach to defining the peoples entitled to self-determination was elaborated during UNESCO’s *International Meeting of Experts on further study of the concept of the rights of peoples* in 1989.¹⁸ The experts called for further study of the concept of peoples based on anthropological, sociological, psychological and other studies whilst suggesting that features such as racial or ethnic identity, linguistic unity, and a common will to be identified as a people are inherent in a description of a people.

An argument in favour of a primary right of unilateral secession might therefore combine elements of the ascriptivist and plebiscitary theories and proceed in the following syllogistic way:

1. Self-determination is concerned with the free choices of peoples (usually expressed via plebiscite).
2. Peoples are defined according to their substantive characteristics (whether objectively defined, subjectively defined, or some mixture of the two).
3. Therefore substantively defined peoples have a right to choose to secede from existing states.

The argument is superficially appealing, not least because it seems make a clear distinction between self-determination and alien-determination (where the latter is understood to mean one group determining the fate of another.) As Kymlicka has pointed out, where states containing several ethnic groups afford formally equal rights to all of their citizens, the

¹⁷ Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* UN Doc. E/CN.4/Sub.2/384/Rev.1, 568.

¹⁸ UNESCO, *International Meeting of Experts on further study of the concept of the rights of peoples* SHS-89/CONF.602/7.

possibility is left open of the majority groups dominating the minority groups.¹⁹ In certain circumstances, allowing those minority groups to secede and seize control of new states might alleviate that problem. The question is: does this understanding of self-determination have a basis in international law?

3.2.2 *Challenges to primary right theories*

As noted in the previous chapter, after becoming the engine of decolonisation the “peoples” to whom self-determination applied were territorially defined. In other words, international law adopted a formal definition of “peoples” based on the administrative boundaries of colonial units. It will also be recalled that self-determination did not apply to minority groups within those territorial units. The concept of “peoples” was a *de facto* majoritarian formula: it applied to the population of the territory as a whole and had little to say about the position of other groups within the territory. It was, at best, self-determination for the majority and alien-determination for everybody else.

Although the concept of peoplehood remains somewhat obscure, I will argue that state practice since decolonisation suggests that “peoples” are *still* understood in terms of the whole people of territorial units. At the same time, there are persuasive arguments to the effect that the *whole people* formula does not any longer entail a monolithic, majoritarian understanding of peoplehood. This interpretation combines a realistic understanding of the limits of international law (a system of law largely made *by* states, *for* states) with a pragmatic attempt to reconcile international law’s state-centrism with the fact that states have a tendency to oppress minority groups.

The argument that sub-state groups are entitled to the right of self-determination *qua* sub-state groups (either in their corporate character or as a collection of individuals) runs into several challenges. Firstly, the resolutions of representative international organisations, such as the UN General Assembly, constantly qualify their references to self-determination with strong affirmations of the principle of territorial integrity. Territorial integrity in this context may be understood as a doctrine aimed at the protection and preservation of the spatial dimension of

¹⁹ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1995), 51.

state sovereignty. As Shaw points out, this spatial dimension of state sovereignty “provides the essential framework for the operation of an international order that is founded upon strict territorial division”.²⁰ One example of this approach can be seen in the UN Declaration on Friendly Relations, which elaborates upon self-determination before adding (in a so-called “saving clause” which will be explored below):

“Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples... and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour²¹.”

The same cautious approach tends to be adopted whenever the topic of minority rights is raised. For example, the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* very carefully subjects the contents of the declaration to the principle of territorial integrity.²² Vidmar correctly understands this linkage between self-determination and territorial integrity to imply that, beyond the colonial context, self-determination “will normally be consummated internally within the international borders of the parent state and thus will not result in a new state”.²³ Territorial integrity therefore acts as a serious obstacle to any claimed right of secession.

It seems to be the case that the concept of *peoplehood* is interpreted according to the demands of territorial integrity outlined above. For example, the Final Communiqué of the Action Group for Syria (hereafter “Geneva Communiqué”), adopted in June 2012 in connection with the ongoing Syrian civil war, supports the territorial integrity of Syria and notes, “It is for the Syrian people to determine the future of the country²⁴.” The UN Security Council later

²⁰ Malcolm Shaw, ‘The Heritage of States: The Principle of Uti Possidetis Juris Today’ 67 *British Yearbook of International Law* (1996) 75, 75.

²¹ General Assembly Resolution 2625 (XXV), *Declaration on Friendly Relations*.

²² General Assembly Resolution 47/135, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.

²³ Jure Vidmar, ‘Territorial Integrity and the Law of Statehood’ 44 *George Washington International Law Review* (2012) 697, 708.

²⁴ *Action Group for Syria, Final Communiqué*,

<<http://www.un.org/News/dh/infocus/Syria/FinalCommuniqueActionGroupforSyria.pdf>> accessed 09/05/16.

reconfirmed its endorsement of the Geneva Communiqué and stressed that the “Syrian people” will decide the future of Syria.²⁵ The wording of these statements suggests that it is precisely the *whole people of Syria* that will exercise the right of self-determination, rather than individual groups within Syria possessing multiple separate rights of self-determination. This interpretation is supported by the fact that an attempt by the Syrian Kurds to unilaterally declare a federal region in Northern Syria was quickly rejected by Turkey²⁶ among other states. A *fortiori* the unilateral secession of a Kurdish state from Syria would meet at least the same level of rejection.

The same approach is evident in recent Security Council Resolutions pertaining to the ongoing situation with ISIS in Iraq and to the promise by Iraqi Kurdish authorities to hold a plebiscite on independence. In Resolution 2233, the Security Council reaffirmed the territorial integrity of Iraq. It also used the language of self-determination when it underscored “the need for all segments of the Iraqi population to participate in the political process, in inclusive political dialogue, and in the economic and social life of Iraq²⁷,” which suggests that it is *the people of Iraq as a whole* that possess the right of self-determination. One could also point to the example of the former Yugoslavia, where the Badinter Committee opined: “whatever the circumstances, the right of self-determination must not involve changes to existing frontiers at the time of independence”.²⁸ By virtue of the right of self-determination, the Serbs in Croatia and Bosnia-Herzegovina had the right to belong to whatever ethnic, religious or language community they wished, but the Committee gave no indication that the Serbs had a right to interfere with the territorial integrity of Croatia or Bosnia-Herzegovina.

Of course, these examples are all fairly specific attempts by the international community to deal with complicated political and social problems, and would not necessarily be enough to disprove the primary right theory *tout court*. Further examples will however be considered in the next section in the context of remedial secession. For now, it is sufficient to point out that

²⁵ UN Security Council Resolution 2254 (2015).

²⁶ Turkey has consistently opposed such acts on the basis that the Syrian Kurdish organisation is the same as the PKK. See UN Security Council, *Letter dated 19 February 2016 from the Permanent Representative of Turkey to the United Nations addressed to the President of the Security Council* (2016) UN Doc. S/2016/163.

²⁷ Security Council Resolution 2233 (2015).

²⁸ See Badinter Arbitration Committee, *Opinion No. 2* in Alain Pellet, ‘The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples’ 3 *European Journal of International Law* (1992) 178.

self-determination applies within the spatial dimension of state sovereignty, as protected by the doctrine of territorial integrity.

Another major challenge to primary right theories emerges with the *United Nations Declaration on the Rights of Indigenous Peoples*²⁹ (hereafter ‘UNDRIP’), which was adopted by the General Assembly in 2007. The drafting history of UNDRIP involved significant participation by indigenous communities whose dispossession and oppression has been legitimised in historical and modern perspective by public international law.³⁰ Its contents significantly improve upon the legal standards enumerated in ILO Convention 169 by, for example, requiring states to obtain the ‘free, prior and informed consent’ of indigenous peoples before ‘adopting and implementing legislative or administrative measures that may affect them’ (article 19) and by recognising that indigenous peoples have certain *collective* rights in addition to individual rights. The legal status of UNDRIP is complex, but scholarly opinion indicates that it represents a mixture of customary international law, elaborations of already existing human rights standards, and moral-political standards.³¹ The fact that it was adopted by an overwhelming majority of the UN General Assembly provides strong evidence of *opinio juris*; and the fact that UNDRIP has been used as a ‘parameter of reference’³² by other human rights bodies and courts (as well as by national legislatures) testifies to its utility as a clarification of other human rights standards (and its success in mainstreaming indigenous rights). In summary although General Assembly resolutions are not formally binding sources of international law, UNDRIP clearly represents, in significant part, something more than simple moral-political guidelines.

Both the negotiating history and the content of the declaration suggest that there is no primary right of secession for sub-state groups. Although the declaration states in Article 3 that indigenous peoples have the right to self-determination, it subsequently states in Article 4 that this right is limited to autonomy or self-government in matters relating to their internal and local affairs. So if it is true that substantively defined peoples have the right to secede from existing states by virtue of the right of self-determination, then we must believe that indigenous peoples have a less far-reaching right of self-determination than other groups, since they only

²⁹ General Assembly Resolution 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*

³⁰ See Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005).

³¹ Felipe Gómez Isa, ‘The UNDRIP: an increasingly robust legal parameter’, *International Journal of Human Rights* (2019).

³² *Ibid*, p. 8.

have the right to autonomy or self-government. This conclusion seems counter-intuitive given the fact that indigenous groups are generally among the most vulnerable groups in society and therefore in need of *greater* degrees of protection than most other groups. Furthermore, the declaration concludes by repeating the usual connection between self-determination and territorial integrity in language that unambiguously applies to peoples, groups, and persons as well as states.³³ The absence of a right of secession in the UNDRIP is the result of concerted effort on the part of states.³⁴ Indeed, disagreements around the provisions on self-determination were a major contributing factor to the decades-long delay in adopting UNDRIP. When the declaration was eventually adopted, many states chose to refer explicitly to the provisions on self-determination. In one fairly representative statement, the Swedish representative noted: “the text’s reference to self-determination should not be construed as authorizing or encouraging any action which would impair the territorial integrity or political unity of sovereign and independent states.”³⁵

In conclusion, the peoples entitled to self-determination are defined in a formal manner based on territorial boundaries. There is no right of self-determination for sub-state groups *qua* sub-state groups, and the available evidence suggests that there is no primary right of unilateral secession. This understanding of the modern concept of self-determination also finds support in judicial discourse. For example, the Canadian Supreme Court in *Reference Re Secession of Quebec* noted that, at best, self-determination generates a right of external self-determination in colonial situations, in situations of alien occupation, or where a definable group is denied meaningful access to government.³⁶ The court also implicitly treated the Québécois people as a segment of the whole people of Canada rather than a separate people (although it also referred to the “people of Quebec”³⁷ as well as the “people of Canada”³⁸) by holding that their eventual secession would have to be negotiated with the other Canadian provinces and the federal government of Canada. The UN Committee on the Elimination of Racial Discrimination (“CERD”) advanced a similar view in its General Recommendation 21 on the right of self-determination, where it argued that international law has not yet recognised a right of unilateral

³³ *Supra* n. 29, Art. 46(1).

³⁴ See Ward Churchill, ‘A Travesty of a Mockery of a Sham: Colonialism as ‘Self-Determination’ in the UN Declaration on the Rights of Indigenous Peoples’ 20 *Griffith Law Review* (2011) 526.

³⁵ UN Doc. GA/10612

³⁶ Canadian Supreme Court, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 138.

³⁷ *Ibid*, para. 92.

³⁸ *Ibid*, para. 85.

secession, though it does not exclude “the possibility of arrangements reached by free agreements of all parties concerned”.³⁹

3.2.3 *The ‘whole people’ formula*

All of this raises an important question: when one speaks of the whole population of a particular state, does this necessarily refer to the *majority* of the state concerned? Thornberry has argued that it is possible to consider a less monolithic meaning of ‘peoples’ by essentially disaggregating the *whole people* formula and considering the interests of the diverse groups that together make up the whole people of the territorial unit.⁴⁰ In his view:

“A less majoritarian, more differentiated, participatory and communitarian meaning of “people” carries opportunities and few risks if the participation is genuine and not simply asserted. A mature concept of peoples respects and incorporates diversity and takes strength from it”.⁴¹

Thornberry’s understanding of self-determination places less of a premium on the notion of “peoples” because, for example, even though the Kurds in Turkey do not qualify as a distinct people by virtue of their substantive characteristics, they are entitled to the right of self-determination because they are undoubtedly a major part of the people of Turkey as a whole. The disaggregated whole people formula also dictates that self-determination is not a right that belongs to groups *qua* groups, but to groups *qua* members of larger territorial units. In general, as the Canadian Supreme Court observed in the context of the Canadian constitution⁴², secession should therefore be the product of a broad process of participation involving all relevant segments of the territorial unit, rather than a right held exclusively by the sub-state group. In the Canadian Supreme Court’s words: “We hold that Quebec could not purport to invoke the right of self-determination such as to dictate the terms of a proposed secession to the other parties...”⁴³

³⁹ CERD, *General Recommendation No. 21: Right to self-determination*. UN Doc. A/51/18.

⁴⁰ Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism* in Christian Tomuschat, *Modern Law of Self-Determination* (Martinus Nijhoff 1993), 126-128.

⁴¹ *Ibid*, 128.

⁴² *Supra* n. 36, paras. 88-97.

⁴³ *Ibid*, para. 91.

This understanding of the whole people formula is expressed in the Geneva Communiqué, which notes that it is for the people of Syria to determine the future of the country, and that “all groups and segments of society in Syria must be enabled to participate in a National Dialogue process”.⁴⁴ It also finds expression in the General Assembly’s reaction to the 2014 referendum in Crimea, which led to the incorporation of Crimea with Russia. In Resolution 68/262, the General Assembly stressed the importance of “maintaining the inclusive political dialogue in Ukraine that reflects the diversity of its society and includes representation from all parts of Ukraine”.⁴⁵ The focus in both examples is on a *broad* understanding of participation, which in some way involves all groups and segments of society, rather than solely the majority of the state concerned.

The disaggregated whole people formula is also suggested by a broad but consistent reading of the international human rights framework, which is increasingly concerned with the rights of minorities and the beneficial impact, in terms of international peace and security, of minority participation.⁴⁶

In conclusion, “peoples” for the purposes of the right of self-determination, are defined according to formal rather than substantive criteria (namely, according to territorial boundaries), but other groups within those formal units also have a share of the right of self-determination. Seen in this light, the premium placed on possessing the characteristic of peoplehood decreases: whether the sub-state group possesses a discrete right of self-determination as a people which overlaps with other discrete self-determination rights within the state, or whether the sub-state group benefits from self-determination by virtue of being a segment of the whole people, the outcome is broadly the same. Either way, self-determination does not entail a unilateral right to secede without engaging in a two-way process with the rest of the state. There is no primary right of secession for sub-state groups.

⁴⁴ *Supra* n.24.

⁴⁵ General Assembly Resolution 68/262.

⁴⁶ Gaetano Pentassuglia, ‘State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal View’ 9 *International Journal on Minority and Group Rights* (2002) 303, 313.

3.3 Remedial right theories—a critique

It will be recalled that the remedial secession argument views secession as a right contingent on evidence of gross human rights violations or lack of representation in or by the central government. The argument takes many different forms, but often contains the following requirements:

1. The seceding group must be a numerical minority within the state but a numerical majority within an identifiable part of the territory.
2. The group must have suffered grievous wrongs at the hands of the parent state from which it wishes to secede (this could take the form of serious and widespread violations of their fundamental human rights or their unreasonable exclusion from the organs of state, such as the government and parliament, or both).
3. There must be no further, realistic and effective remedies for the peaceful settlement of the conflict.⁴⁷

Although the peoples entitled to self-determination are defined according to the formal criteria detailed above, this argument would hold that the affected sub-state group has a right to act unilaterally, that is to say without being legally required to engage in the aforementioned two-way process, if the relevant criteria are met.

There is some limited support for the remedial secession thesis in judicial discourse. For example, the Canadian Supreme Court in *Reference re Secession of Quebec* noted that a number of commentators had asserted that the right of self-determination might ground a right to unilateral secession when a people is blocked from exercising its right to self-determination internally⁴⁸, but then noted that “it remains unclear whether this... actually reflects an established international law standard”⁴⁹ and, at any rate, it was not necessary for the court to make that determination because the Quebec context did not approach such a threshold. In similar vein, the concurring opinion of judges Wildhaber and Ryssdal in *Loizidou v Turkey* noted that there was an emerging consensus that “peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are

⁴⁷ David Raič, *Statehood and the Law of Self-Determination*, (Brill Academic Publishers 2002), 332.

⁴⁸ *Supra* n.36, para. 134.

⁴⁹ *Ibid*, para. 135.

without representation at all or are massively under-represented in an undemocratic and discriminatory way”.⁵⁰ Again, the judges carefully avoided explicitly affirming that “emerging consensus”.

Attempts to establish the remedial right theory at the level of general international law draw on a variety of sources and theoretical arguments. Exigencies of space preclude a full examination of every possible argument, but it is possible to extract at least three of the strongest ones from a review of the available literature. The first argument relies on a particular exegesis of the UN General Assembly *Declaration on the Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations* (hereafter “Declaration on Friendly Relations”), which was adopted by the General Assembly in 1970 and annexed to Resolution 2625. The resolution purports to aid the interpretation of several aspects of the UN Charter. The second argument—which is linked with the first argument—focuses on state practice since 1945 and attempts to prove the existence of a remedial right of secession at the level of customary international law. State practice could also inform the interpretation of the treaty-based right of self-determination under Article 31(3)(b) of the Vienna Convention, which requires “any subsequent practice in the application of the treaty” to be taken into account under the general rule of interpretation. The third argument takes a broad view of international law and the context within which it operates. It argues that the traditional notions of state sovereignty have changed and that one can reason from these changes to the acceptance of remedial secession. These changes in the modern concept of sovereignty are the result of what Koskenniemi refers to as *sociological* and *ethical* factors.⁵¹ Sociological factors attempt to explain the erosion of state sovereignty on the grounds of factual developments in the international world, such as “economic, military or ecological interdependence between nations and a resulting ‘globalisation of politics’”.⁵² Ethical factors stress “the analytical and moral priority of the individual to the state and point to the frequent historical use of the state apparatus for oppression”⁵³ and see all people “united in a Kantian community of independent individuals equally entitled to human rights and

⁵⁰ ECHR *Loizidou v Turkey* (1996) (Application no. 15318/89), 24.

⁵¹ Martti Koskenniemi, ‘The Wonderful Artificiality of States’ 88 *Proceedings of the Annual Meeting (American Society of International Law)* (1994) 22, 23.

⁵² *Ibid.*

⁵³ *Ibid.*

fundamental freedoms”.⁵⁴ These three related arguments will be analysed in the following sections.

3.3.1 *Arguments for remedial secession I: The Declaration on Friendly Relations*

In its Resolution 2625 of 1970, the UN General Assembly was “Convinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among states, based on respect for the principle of sovereign equality.” In its section on self-determination, the annexed Declaration on Friendly Relations notes that self-determination may be achieved by the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people.

The so-called *saving clause* (quoted above at page 66) begins by repeating the standard refrain that self-determination must be exercised in a way that does not violate territorial integrity, but an *a contrario* reading of the clause suggests that it is only states “possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour” that are entitled to the protection of their territorial integrity. According to this interpretation, the limitations imposed on self-determination by the requirement of territorial integrity are lifted, and qualifying sub-state groups have a right to unilaterally secede. The later *Vienna Declaration and Programme of Action*, adopted in 1993 by the World Conference on Human Rights, expanded the saving clause by echoing its wording but replacing “without distinction as to race, creed or colour” with “without distinction of any kind.”

There is a fairly prominent strand of scholarship that extracts from these declarations a customary law right of remedial secession. Quite often, the scholars who take this view construct a cumulative case based on some combination of the declarations, state practice, judicial discourse, and the overall context within which they exist. For example, John Dugard analyses the two declarations and adds “Consequently, it may be argued that today a government that denies equal rights and self-determination to a people and is thus possessed

⁵⁴ *Ibid.*

of a government that does not represent the whole people belonging to a territory forfeits the right to respect for its territorial integrity. That is, in the final resort, a people so treated may exercise a right of remedial secession”.⁵⁵ In addition to this, Dugard cites evidence from judicial discourse and what he calls a “new approach to sovereignty”⁵⁶ before finally offering the conclusion that remedial secession is part of this new understanding of sovereignty.

Not all scholars take the same view. For example, Pentassuglia argues that the reference to the “whole people” in the declarations indicates that it is precisely the “whole people” of a state that is entitled to react to discriminatory governments.⁵⁷ His interpretation is supported by the fact that the drafters of the Declaration on Friendly Relations had in mind the specific circumstances of Apartheid South Africa, and the additional fact that subsequent UN Security Council Resolutions, such as Resolution 417 on South Africa, affirmed the right to self-determination of the people of South Africa *as a whole*, irrespective of race, colour or creed. The racist minority government was not conducting itself in compliance with the principle of equal rights and self-determination precisely because it did not represent the whole people.

As a potential expression of *opinio juris* in favour of remedial secession by sub-state groups, the Declaration on Friendly Relations has rather weak historical foundations. An examination of the reports of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation Among States—which was established under the aegis of the UN General Assembly and prepared the draft of the Declaration—reveals a lack of consensus among the representatives of participating states. By the time of its sixth report, it was noted that there was no agreement on the inclusion of any statement under the heading of “Implementation of [self-determination] by a State with respect to peoples within its jurisdiction”.⁵⁸ Participants disagreed on the subject of the right of minority groups to secede, with some arguing that this was essentially a matter for domestic constitutional law and others arguing that it was an issue to be dealt with by international law and that “provision must be made to safeguard the territorial integrity and political unity of states”.⁵⁹ In the end, the saving

⁵⁵ John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo* (Hague Academy of International Law 2013), 145-146..

⁵⁶ *Ibid* at p. 152.

⁵⁷ Gaetano Pentassuglia, *supra* n. 46.

⁵⁸ UN General Assembly, *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-Operation Among States*, UN Doc. A/8019, para. 61.

⁵⁹ *Ibid*, para. 77.

clause emerged as a compromise and the draft declaration was introduced to the General Assembly's 25th session by the representative of Mexico with the observation that "the subtle balance of the text of the draft Declaration was the necessary prerequisite for its unanimous adoption by all members of the special committee".⁶⁰ It should be apparent that the meaning of the Declaration on Friendly Relations was deliberately left open to interpretation.

Moreover, expressions of *opinio juris* are not limited to the contents and negotiating history of the Declaration on Friendly Relations. In particular, States' submissions to the International Court of Justice (hereafter 'ICJ') pertaining to its 2010 case on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (hereafter '*Kosovo*') also furnish valuable evidence.

To briefly recall the facts of the case, the claimed independence of Kosovo from Serbia did not trigger the disappearance of Serbia, and must therefore be considered an act of *secession* rather than *dismemberment*.⁶¹ Kosovo's Declaration of Independence came after the UN Secretary General's Special Envoy on Kosovo's Future Status, Martti Ahtisaari, argued "independence is the only option for a politically stable and economically viable Kosovo"⁶² and after a period of intensive international supervision following NATO's intervention. Kosovo had been an autonomous region within Serbia until Milosevic had forcefully stripped it of that status. In Resolution 1244 (1999) the UN Security Council had noted the "grave humanitarian situation in Kosovo" and condemned the "violence against the Kosovo population" whilst "reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia." Although the Security Council called for substantial autonomy for Kosovo, it clearly did not envisage a right of unilateral secession. This was a reflection of the 1999 Rambouillet Accords, which saw no contradiction between a strong affirmation of the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and a recognition of "the need for democratic self-government in Kosovo".⁶³

⁶⁰ *Yearbook of the United Nations* – 1970, 787.

⁶¹ Jean D'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement' 20 *Leiden Journal of International Law* (2007) 649, 657.

⁶² UN Security Council, *Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2007/168.

⁶³ UN Security Council, *Letter dated 4 June 1999 from the Permanent Representative of France to the United Nations addressed to the Secretary-General*, UN Doc. S/1999/648.

The ICJ was asked by the UN General Assembly to answer the question: ‘Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?’⁶⁴ The Court construed the question narrowly, deciding that it was ‘not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it.’⁶⁵ The court thereby distinguished formal declarations of independence from the separate (but related) matters of the acquisition *vel non* of statehood and the question of whether international law confers a right of secession. As James Crawford put it in his oral submissions to the court on behalf of the United Kingdom, a formal declaration of independence of the kind considered by the ICJ in *Kosovo* is analogous to the expression of a wish for independent statehood but it by no means makes the wish a reality.⁶⁶ The Court was concerned with the legality of the expression of that wish.

The Court’s answer in the *Kosovo* case was that neither general international law nor the applicable *lex specialis* contained a prohibition of declarations of independence, which are not regulated by general international law. The Court noted in passing that states took ‘radically different views’ on the validity of the remedial secession thesis, but—like the Canadian Supreme Court and the European Court of Human Rights—expressed no opinion on the matter.⁶⁷ Nevertheless, the individual submissions of participating states are worth considering insofar as they strongly suggest that there is no widespread *opinio juris* in support of remedial secession. Indeed, only eleven out of thirty-six participating states argued in favour of it⁶⁸ and some states explicitly rejected it. Moreover, some of the states that supported the remedial secession thesis disagreed about the scope of the right. Exigencies of space preclude a comprehensive analysis of states’ submissions to the Court, but a few examples will suffice to illustrate the main point.

⁶⁴ UN General Assembly Resolution 63/3 (2008), UN Doc. A/RES/63/3

⁶⁵ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion, 2010), para. 56.

⁶⁶ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Verbatim Record, 2009), UN Doc. CR/2009/32, para. 12.

⁶⁷ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion, 2010), paras. 82-83.

⁶⁸ Simone F. Van den Driest, ‘From Kosovo to Crimea and Beyond: On Territorial Integrity, Unilateral Secession and Legal Neutrality in International Law’ 22 *International Journal on Minority and Group Rights* (2015) 467, 480.

Spain's written submission to the Court engaged with the principles of sovereignty, territorial integrity, and self-determination as well as the practice of the UN Security Council before concluding that even in cases of 'serious violations of human rights against the civilian population' the sovereignty and territorial integrity of states must be upheld.⁶⁹ Argentina argued that any modification of a state's territorial sovereignty must occur with the consent of the interested state, and that 'the so-called theory of "remedial secession" is nothing more than an argument made in doctrine, and which has not received any legal consecration'.⁷⁰ Similarly, Bolivia argued that 'the fact that a state pursues a discriminatory policy against an ethnic group cannot, as such, give rise to a right to unilateral secession'.⁷¹ Cyprus too denied that remedial secession has emerged as a right in customary international law.⁷²

On the other side of the ledger, Finland argued that the nexus between the right of self-determination and territorial integrity is not absolute, and that in abnormal situations—which include 'situations of revolution, war, alien subjugation or the absence of a meaningful prospect for a functioning internal self-determination regime'—the very territory which is supposed to be legally sacrosanct is up for debate. In Finland's view, Kosovo's declaration of independence was legal because of, *inter alia*, the persecution of the Kosovar Albanians.⁷³ Germany also accepted the remedial secession argument subject to two qualifying conditions, namely that there has been an 'exceptionally severe and long-lasting refusal of internal self-determination by the state in which a group is living' and that no other avenue exists for resolving the conflict.⁷⁴ Russia argued that secession is authorised under certain conditions, but that those conditions are strictly limited to 'truly extreme circumstances, such as outright armed attack

⁶⁹ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Written Statement of the Kingdom of Spain, 2009).

⁷⁰ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Written Statement of the Argentine Republic, 2009).

⁷¹ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Written Commentary by the Plurinational State of Bolivia, 2009).

⁷² International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Written Statement Submitted by the Republic of Cyprus, 2009).

⁷³ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Statement of Finland, 2009).

⁷⁴ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Statement of the Federal Republic of Germany, 2009).

by the parent state, threatening the very existence of the people in question’⁷⁵—a rather different set of criteria from those advanced by Germany and Finland.

The *Kosovo* case, in combination with the Declaration on Friendly Relations, therefore demonstrates that there is nothing approaching an international consensus on the existence of a remedial right of secession. Moreover, even if one accepts Cassese’s view of the Declaration on Friendly Relations—namely that “since the possibility of impairment of territorial integrity is *not totally excluded*, it is logically admitted”⁷⁶, the important question is: has remedial secession been established at the level of customary international law? In order to answer that question, it is necessary to search for evidence of consistent state practice.

3.3.2 *Arguments for remedial secession II: State practice since 1945*

Proponents of the remedial secession thesis often point to the unilateral secession of Bangladesh in 1971 and its subsequent membership of the United Nations in 1974 as an example of remedial secession in practice.⁷⁷ Indeed, in its 1972 report *The Events in East Pakistan* the International Commission of Jurists noted the large-scale atrocities committed by the Pakistani army in East Pakistan, the principal features of which were the “indiscriminate killing of civilians, including women and children and the poorest and weakest members of the community; the attempt to exterminate or drive out of the country a large part of the Hindu population... The raping of women; the destruction of villages and towns,” among other grave crimes.⁷⁸ The people of East Pakistan were also excluded from the central government after they won a general election in December 1970. *Prima facie*, this is a good example of successful remedial secession in practice: The people of East Pakistan had suffered grievous wrongs at the hands of the Pakistani state, they inhabited an identifiable part of the territory of Pakistan, and the prospects for the peaceful resolution of the conflict were extremely dim after the National Assembly was dissolved in 1971. Furthermore, although the act of state

⁷⁵ International Court of Justice, *Accordance With International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Written Statement by the Russian Federation, 2009).

⁷⁶ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995), 119.

⁷⁷ See David Raič, *supra* n.47.

⁷⁸ International Commission of Jurists, *The Events in East Pakistan, 1971: A Legal Study by the Secretariat of the International Commission of Jurists*, 26-27.

recognition is only of declaratory rather than constitutive relevance⁷⁹, the act of recognition can, under certain circumstances, be taken as evidence that the international community has accepted the claim of the affected group to self-determination in the form of secession. This was the stance adopted by the concurring opinions of judge Wildhaber and judge Ryssdal in the case of *Loizidou v Turkey*⁸⁰, who held that the failure of the international community to recognise the Turkish Republic of Northern Cyprus (TRNC) as a new state under international law was an implicit rejection of the claim of the TRNC to self-determination in the form of secession. By the same token, it could be argued that the recognition of Bangladesh was an implicit *acceptance* of the claim of Bangladesh to self-determination in the form of secession. This claim is bolstered by the observation that at the time of its secession, the Bangladeshi government did not have effective control over its territory⁸¹ – one of the requirements of a state as a person of international law under Article 2 of the *Montevideo Convention on the Rights and Duties of States*. According to Raič, the rationale for international recognition of the new state of Bangladesh, despite its lack of an effective government, was the existence of a right of external self-determination and exclusive title to exercise authority over the relevant territory.⁸²

The problem with this argument is that the decision to recognise the state of Bangladesh had much to do with the strength of the Indian army, and apparently very little to do with the right of self-determination. Despite the atrocities committed by the Pakistani army, no state other than India was prepared to recognise Bangladesh prior to the Indian army's victory over Pakistani forces in December 1971.⁸³ Bangladesh was not admitted to the United Nations until *after* it had been recognised by Pakistan. Also, on 7 December 1971, the UN General Assembly adopted Resolution 2793, expressing its *grave concern* about the hostilities between India and Pakistan but omitting to mention the right of self-determination. The fact that no states other than India were prepared to recognise Bangladesh prior to the victory of the Indian army, combined with the fact that the General Assembly did not see fit to raise the right of self-determination, provides persuasive evidence that there was no right to secede. The eventual admission of Bangladesh to the UN was a result of the *fait accompli* imposed by the Indian army and reluctantly accepted by Pakistan. Under these circumstances, it was incumbent on

⁷⁹ Montevideo Convention on the Rights and Duties of States, Article 3.

⁸⁰ ECHR *Loizidou v Turkey* (1996) (Application no. 15318/89).

⁸¹ David Raič, *supra* n. 47.

⁸² *Ibid.*

⁸³ James Crawford, *The Creation of States in International Law* (OUP 2006), 393.

the international community to recognise the new reality. Furthermore, the unusual post-partition geography of Pakistan was an important factor in the secession and eventual recognition of Bangladesh. West and East Pakistan were separated by some 1,200 miles of Indian territory and, although they shared a common majority Muslim religious character, the two territories were separated linguistically.⁸⁴

Other examples provide compelling evidence that there is no right of remedial secession at the level of customary international law. One particularly striking example is the case of Iraq in 1991. As is widely known, after being forced out of Kuwait in 1991, Saddam Hussein engaged in a campaign of mass atrocities against the Iraqi population. Even before 1991, Human Rights Watch, commenting on the atrocities carried out against the Kurdish population in particular, noted the “ravages caused by the Iraqi government’s use of poison gas against Kurdish civilians,” its “killing and torture of Kurds,” its “deliberate policy of expulsion and forced resettlement,” and its “creation of a vast free-fire zone, emptied of population and dotted by the ruins of flattened dwellings, where hundreds or perhaps thousands of Kurdish villages once stood”.⁸⁵ The response of the international community to the massive atrocities was quite clear. The UN Security Council adopted several resolutions in 1991, including Resolutions 686 and 687, in which they “reaffirmed the commitment of all Member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq”.⁸⁶ Despite the discriminatory regime of Saddam Hussein, the violations of fundamental rights, and the presence of a numerical minority within the state of Iraq forming a majority in the Kurdistan region, the international community actively affirmed the continued territorial integrity of Iraq. Even Security Council Resolution 688, which Kurds often revere as the Resolution that established the no-fly zones north of the 36th parallel and south of the 32nd parallel – zones that created the necessary space for the creation of an autonomous Kurdistan region – noted that the Security Council was “*gravely concerned* by the repression of the Iraqi civilian population in many parts of Iraq...” and “*Deeply disturbed* by the magnitude of the human suffering involved.” And yet, at the same time, the Security Council reaffirmed “the commitment of all Member States to respect the sovereignty, territorial integrity and political independence of Iraq and of all states in the region.” Again, there was no mention of self-determination and no indication on the part of the international community that the oppressed Kurds had a right of

⁸⁴ International Commission of Jurists, *supra* n. 78.

⁸⁵ Middle East Watch, *Human Rights in Iraq* (Human Rights Watch Books 1990), 69.

⁸⁶ UN Security Council Resolution 687 (1991).

secession. Indeed, on 17th December 1991, UN General Assembly Resolution 46/134 referred to Saddam's atrocities against the Kurdish population (which included the use of chemical weapons and the forced displacement of hundreds of thousands of Kurds) and called upon the government of Iraq to abide by its human rights obligations, in particular "to respect and ensure these rights for individuals irrespective of their origin within its territory..." The focus was on ensuring respect for human rights within Iraqi territory, rather than recognising a Kurdish right to secede from Iraq.

Moreover, the outcome of Kosovo's Declaration of Independence seems to demonstrate that there is no right of remedial secession: the territorial integrity of the Federal Republic of Yugoslavia was constantly reaffirmed, few states accepted the validity of the remedial secession thesis, and Kosovo is yet to become a member of the United Nations. Kosovo has, however, been recognised by a substantial majority of EU member states—although two states (Spain and Cyprus) refuse to recognise it and engage with it, and three states (Greece, Romania and Slovakia) refuse to recognise but have nonetheless forged relations with it.⁸⁷ It is this general willingness on the part of the European Union to extend recognition to Kosovo—and the possibility of its eventual membership—that made its unilateral declaration of independence seem feasible in spite of its landlocked geography.

In fact, as James Crawford pointed out in 2006: "Since 1945 no state which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor state".⁸⁸ This suggests that there is nothing approaching an international consensus when it comes to unilateral secession.

When one analyses the examples of successful secessions it becomes apparent that they face many obstacles in practice. From Eritrea to South Sudan, the internationally recognised declarations of independence outside of the decolonisation context emerged as a result of consensus between the seceding entity and the host state (although one must recognise that in many cases the consensus only became possible after protracted violent hostilities, and sometimes after outright civil war).

⁸⁷ James Ker-Lindsay & Ioannis Armakolas, *Lack of Engagement? Surveying the Spectrum of EU Member State Policies Towards Kosovo* (Kosovo Foundation for Open Society, 2017).

⁸⁸ James Crawford, *supra* n. 83, 390.

Furthermore, Article 41(2) of the International Law Commission's articles on the *Responsibility of States for Internationally Wrongful Acts* provides that "No state shall recognise as lawful a situation created by a serious breach [by a State of an obligation arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation." Seceding entities should not therefore be recognised if their secession was assisted by the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state. Although the ILC's articles—which partly codify customary international law and partly progressively develop it—are not in themselves a source of international law⁸⁹ they have been commended by the UN General Assembly⁹⁰ and there exists a strong 'feedback loop' between the ILC's work and the opinions of the International Court of Justice.⁹¹ Given the expertise of the Commission's members, and the amount and quality of work that went into the articles' preparation, they provide authoritative guidance to international lawyers.

This seems to explain the Security Council's 1961 response to the attempted secession of Katanga, which deplored "secessionist activities and armed action now being carried out in Katanga with the aid of external resources and foreign mercenaries" and declared the secessionist activities *illegal*.⁹² Again, in the case of Crimea the presidents of the European Council and the European Commission noted that the 2014 independence referendum was "illegal and illegitimate and its outcome will not be recognised," before going on to state that the "solution to the crisis in Ukraine must be based on the territorial integrity, sovereignty and independence of Ukraine"⁹³. Similarly, UN General Assembly Resolution 68/262 underscored that the referendum had no validity. These responses came in the context of probable Russian aggression⁹⁴ and a lack of Ukrainian consent to the secession (indeed, Article 73 of the

⁸⁹ David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority', 96(4) *The American Journal of International Law* (2002) 857.

⁹⁰ UN General Assembly Resolution 56/83 (2002).

⁹¹ David Bederman, 'Counterintuiting Countermeasures', 96(4) *The American Journal of International Law* (2002) 817.

⁹² UN Security Council Resolution 169 (1961).

⁹³ Available at: <http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141566.pdf> accessed 31/07/16.

⁹⁴ Christian Marxsen, 'The Crimea Crisis: An International Law Perspective' 74 *Heidelberg Journal of International Law* (2014) 367.

Ukrainian Constitution provides that alterations to the territory of Ukraine require an all-Ukrainian referendum⁹⁵), as well as question marks over the modalities of the referendum.⁹⁶

According to state practice then, international law is unlikely to recognise the statehood of a new entity unless it can overcome the territorial counter-claim of the parent state⁹⁷, and the secession must have been achieved without recourse to foreign aggression against the host state (although there is certainly some inconsistency on this point: very probably, the claimed secession of Kosovo was in large measure a result of NATO aggression against Serbia, and yet some 112 states have recognised its independence⁹⁸). These barriers are surely quite substantial for sub-state groups seeking to exercise the purported freedom to unilaterally secede.

3.3.3 *Arguments for remedial secession III: The erosion of state sovereignty*

Tomuschat succinctly states the argument from the erosion of state sovereignty:

“Within a context where the individual citizen is no more regarded as a simple object, international law must allow the members of a community suffering structural discrimination – amounting to grave prejudice affecting their lives – to strive for secession as a measure of last resort after all other methods employed to bring about change have failed”.⁹⁹

Tomuschat claims that “in our contemporary epoch, sovereign equality of states has lost its monopoly as the central pillar of the edifice of international law”¹⁰⁰ and “on the basis of this deductive reasoning, remedial secession should be acknowledged as part and parcel of positive law, notwithstanding the fact that its empirical basis is fairly thin, but not totally lacking”.¹⁰¹

⁹⁵ *Ibid.*

⁹⁶ Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law* <<http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/>> accessed 31/07/16.

⁹⁷ Simone F. Van den Driest, *supra* n.68, 483.

⁹⁸ See <<http://www.kosovothanksyou.com>> (accessed 31/07/16).

⁹⁹ Christian Tomuschat, *Secession and self-determination* in Marcelo G. Kohen (ed.) *Secession: International Law Perspectives* (CUP 2012), 41.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*, 42.

Tomuschat argues that the debates on the right of remedial secession and the admissibility of humanitarian military intervention converge to cover the same ground: “It appears that the grounds with the potential to justify the assertion of a right of secession are exactly the same as those which members of the international community may invoke in their quest to assist an oppressed minority against a tyrannical government”.¹⁰² In similar vein, Anaya argues that secession may be “an appropriate remedial option in limited contexts... where substantive self-determination for a particular group cannot otherwise be assured or where there is a net gain in the overall welfare of all concerned”¹⁰³ though he notes that in most cases in the postcolonial world, secession would most likely be a curse worse than the disease. Anaya supports his conclusion with the following observation: “since the atrocities and suffering of the two world wars, international law does not much uphold sovereignty principles when they would serve as an accomplice to the subjugation of human rights or act as a shield against international concern that coalesces to promote human rights”.¹⁰⁴ For his part, Dugard notes that developments in human rights law, international humanitarian law and international criminal law testify to a “new approach to sovereignty”.¹⁰⁵ In support of this claim, he cites the notion of *responsibility to protect* contained in the General Assembly’s World Summit Outcome Document of 2005, which is sometimes considered the new guise for a kind of humanitarian intervention. According to Dugard: “Remedial secession is part of this new understanding of sovereignty according to which a State that denies the right of internal self-determination to a minority people living in its territory forfeits the right to have its territorial integrity and national unity respected”.¹⁰⁶

The claim that international law no longer regards the individual as a mere object, and that there has been a radical shift in its approach to sovereignty, is true. For example, Samuel Moyn makes a convincing case that the connection between international law and human rights did not crystallise until the mid-1970s, and he describes this relatively new connection as a “startling and recent departure”.¹⁰⁷ During the era of decolonisation, international law prioritised collective self-determination—understood as the right to choose to become an

¹⁰² *Ibid.*

¹⁰³ James Anaya, *Indigenous Peoples in International Law*, (2 ed.) (OUP 2004), 109.

¹⁰⁴ *Ibid.*

¹⁰⁵ John Dugard, *supra* n. 55, 152.

¹⁰⁶ *Ibid* at p. 153.

¹⁰⁷ Samuel Moyn, *The Last Utopia: Human Rights in History*, (Harvard University Press 2010), 176.

independent state—over individual human rights. Like the ‘rights of man’ projects that came before it, the focus on self-determination “integrated [human rights] in a commitment to collective sovereignty that would later seem the very barrier the concept of human rights was intended to overcome”.¹⁰⁸ Thus the move to the utopia of human rights had to wait until self-determination and decolonisation entered crisis:

“Once, skepticism about human rights in the guise of anticolonialist self-determination had reigned. Soon, enthusiasm for human rights as a potential interference in sovereign jurisdiction took its place”.¹⁰⁹

Bruno Simma expresses international law’s radical shift in his series of lectures on the “community interest”:

“Traditional bilateralist international law permitted States to concern themselves only with the treatment of their own nationals abroad whereas the relationship between foreign governments and “their” respective subjects constituted the very core of domestic jurisdiction into which no other State was allowed to intrude. Today, however, these very relations have become the subject of community interest ranging from discussions of human rights matters in international bodies and conferences, public censure and condemnation, international “mobilisation of shame”, to judgments of human rights courts and sanctions against persistent violators. Thus, international human rights law is turning the States inside out in an almost literal sense”.¹¹⁰

One may go even further and argue, as Simma and Paulus do, that the famous *Lotus* principle according to which legal rules depend upon sovereign State consent is ‘gradually giving way to a more communitarian, more highly institutionalised international law, in which States ‘channel’ the pursuit of most of their individual interests through multilateral institutions.¹¹¹ As Klabbers puts it, it may be that the prevalence of international institutions (among other

¹⁰⁸ *Ibid*, 98.

¹⁰⁹ *Ibid*, 208.

¹¹⁰ Bruno Simma, *Bilateralism and Community Interest Confronted* (Collected Courses of the Hague Academy of International Law 1994) 243.

¹¹¹ Bruno Simma & Andreas L. Paulus, ‘The “International Community”: Facing the Challenge of Globalization’ 9 *European Journal of International Law* (1998) 266, 276-277.

international actors) means that ‘the previous emphasis on State sovereignty, resulting in the image of international law as a horizontal legal order made up of equals... is slowly giving way to a conception of international law as more vertically organised’.¹¹² This increasingly institutionalised system, which ‘increasingly permeates state boundaries for the sake of protection of individual and group rights’¹¹³ arguably challenges the view that legitimate authority rests solely with sovereign States.¹¹⁴ Indeed, it can be said that international institutions such as the various UN institutions ‘compete with states for the scarce resource of politico-legal authority’.¹¹⁵ Again, this supports the claim that State sovereignty is no longer as absolute or as central to the international legal system as once thought.

The problem with the argument from the erosion of state sovereignty is that its proponents deduce overly broad conclusions from the accurate central premise. The fact that international law is concerned with the wellbeing of individuals within sovereign states does not, in this author’s view, lead to the conclusion that states’ territorial integrity and their very existence as sovereign entities over a given span of territory can be called into question. There is too great a deductive leap.

First of all, it is necessary to clarify what is meant by sovereignty—a term with myriad different meanings which are too often elided. Krasner notes that the term has been used in four ways. *International legal sovereignty* refers to “the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence”.¹¹⁶ *Westphalian sovereignty* refers to “political organisation based on the exclusion of external actors from authority structures within a given territory”.¹¹⁷ *Domestic sovereignty* refers to “the formal organisation of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity”.¹¹⁸ *Interdependence sovereignty* refers to “the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state”.¹¹⁹ These four categories can and do overlap. More broadly, sovereignty has both *internal* dimensions (pertaining to the

¹¹² Jan Klabbers, ‘Setting the Scene’ in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds) *The Constitutionalization of International Law* (OUP 2009), 14.

¹¹³ Bruno Simma *supra* n. 111, 277.

¹¹⁴ Jan Klabbers *supra* n. 112, 11.

¹¹⁵ *Ibid.*, 12.

¹¹⁶ Stephen D. Krasner, *Sovereignty: Organised Hypocrisy*, (Princeton University Press 1999), 3.

¹¹⁷ *Ibid.*, 4.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

relationship between citizens and the state) and *external* dimensions (pertaining to the recognition of a state's independence and its right to territorial integrity). Logically, the former could be reduced or limited while the latter remains intact: it could be recognised that state X has a right to territorial integrity and continued existence as an independent State whilst recognising that the nature of its relationship with its citizens is subject to obligations deriving from international law, and is not a purely domestic matter. Krasner's categorisation helps to unpack the claim that sovereignty has lost its monopoly as the central pillar of international law, and that from this premise (either alone or in combination with other premises) one can deduce either a primary or a remedial right to secede. Sovereignty comes in various forms and exists to varying degrees. To speak of a limitation of one kind of sovereignty to a particular degree does not necessarily lead to the conclusion that another kind of sovereignty is similarly, or even more extensively limited.

I argue that modern international human rights law has made inroads into *Westphalian sovereignty*. It is clear that modern international human rights law does not any longer regard the relations between rulers and ruled as a purely internal affair. States are required to uphold their international legal obligations. For sure, a great many of those international obligations are voluntarily assumed by States via their ratification of human rights treaties or their participation in the formation of customary international law (although, as explained above, the doctrine of sovereign State consent might not any longer be a convincing explanation for the binding force of some international legal norms). But as Krasner points out, *Westphalian sovereignty* can be transgressed via invitation as well as coercion. A State that consents to the interference of external structures in its domestic authority structures retains its *international legal sovereignty* (because it remains a recognised state under international law) whilst simultaneously transgressing the principle that the relationship between rulers and ruled ought not to be subject to any external authority. The Permanent Court of International Justice expressed this point in a different way in the 1923 *Case of the S.S. "Wimbledon"*¹²⁰. There, the court declined "to see in the conclusion of a Treaty by which a state undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty¹²¹," and drew a distinction between the "*exercise of sovereign rights*," which may be restricted by consent, and "*sovereign rights*," which, in that case, continued to be possessed by the German Government.

¹²⁰ (1923) PCIJ Series A no 1.

¹²¹ *Ibid*, 25.

More recently, the International Court of Justice in the *Kosovo* case¹²² examined the apparent contradiction between the Security Council's support for the sovereignty of Serbia and the legal regime established under Resolution 1244. The court noted that Resolution 1244 was designed to "suspend temporarily Serbia's exercise of its authority flowing from its continuing sovereignty over the territory of Kosovo".¹²³ In both cases, the courts drew a distinction between sovereign *authority* (which can be suspended or surrendered by consent) and sovereignty *tout court*, which continues to exist even in the absence or limitation of authority. In both cases, the states concerned (Germany and Serbia) remained the internationally recognised sovereign powers over the affected territories (the Kiel Canal and Kosovo), but, to employ Krasner's terminology, their relations between ruler and ruled were subjected to external actors.

At the same time as *Westphalian sovereignty* has been eroded, there is little to suggest that international law has made substantial inroads into *international legal sovereignty* once it has been established. Once a state, as a territorial entity, has been recognised as an equal member of the international community, international law will not withdraw that recognition unless some very stringent requirements have been met.¹²⁴ Crawford observes: "in the Charter period, there have been very few cases of the extinction of states and almost no case of involuntary extinction. The list of the deceased, so to speak, is short".¹²⁵ Ultimately, there is "a strong presumption against the extinction of states once firmly established".¹²⁶

Furthermore, international law will not lightly interfere with the ability of public authorities to exercise effective control within the borders of their own polities in the absence of consent. Although Article 2(7) of the UN Charter makes it clear that coercive measures taken by states under Chapter VII of the Charter can have an impact on the affected state's *domestic sovereignty*, this is a part of the *jus ad bellum* exercised by states (rather than sub-state groups) pursuant to a threat to the peace, breach of the peace or act of aggression; or pursuant to the inherent right of self-defence. Although a determination that these threshold criteria are met might overlap with human rights concerns, there is no *necessary* connection between the two. One striking exception to the observation that international law will not interfere in states'

¹²² *Supra* n. 65.

¹²³ *Ibid*, para. 98.

¹²⁴ James Crawford, *The Extinction of States* in James Crawford, *supra* n. 83.

¹²⁵ *Ibid*, 715.

¹²⁶ *Ibid*.

domestic sovereignty is Security Council Resolution 1244, which reaffirmed the call in previous resolutions for “substantial autonomy and meaningful self-administration for Kosovo” and authorised the UN Secretary-General to establish an international civilian presence in Kosovo in order to provide it with an interim administration. However, the call for substantial autonomy and meaningful self-administration must be viewed in the context of the *sui generis* nature of the situation in Kosovo, as noted above, and it must be recognised that the Security Council welcomed the acceptance by the Federal Republic of Yugoslavia of the international civilian presence.

In order to ground their conclusions, the proponents of the eroded sovereignty thesis must, it is submitted, demonstrate not only that international law no longer allows *Westphalian sovereignty* to stand in the way of human rights protection, but that international law is prepared to grant sub-state groups a right to cut through a state’s territorial integrity and fundamentally alter the territorial extent of the state’s authority in pursuit of human rights. It is one thing to argue that international human rights law claims to involve itself in the domestic decision-making of the target state, and another thing to claim that it involves itself in the continued recognition of an existing state as a sovereign entity over a given span of territory. Examining the argument from the erosion of state sovereignty requires one to distinguish between the two claims, rather than bundling them together under the umbrella term ‘sovereignty’. The right of remedial secession, understood as a negative claim-right, would effectively obligate the host state to surrender its *international legal sovereignty* over the territory of the affected sub-state group. This is fundamentally different from the kind of interference observed in, for example, the *S.S. Wimbledon* case because it does not merely permit interference in the states’ domestic authority structures or suspend the state’s ability to exercise certain kinds of authority over the territory, rather it seeks to fundamentally alter the territorial extent of the state’s sovereignty. There is little in state practice, or in the architecture of international law as a whole, to suggest that international law places such obligations on sovereign states, no matter how parlous the conditions for the oppressed groups living within its borders.

The necessity of establishing this link might explain why some of the proponents of the eroded sovereignty thesis bring up humanitarian intervention, understood as an autonomous justification for the use of force distinct from other legal justifications, and loosely defined as “the use of force to protect people in another state from gross and systematic human rights violations committed against them, or more generally to avert a humanitarian catastrophe,

when the target state is unwilling or unable to act”.¹²⁷ The links between humanitarian intervention and remedial secession are quite clear: both require evidence of gross human rights violations and both purportedly use that evidence to justify interference in a state’s sovereignty beyond the already established interference in *Westphalian sovereignty*. But the differences are also very clear: humanitarian intervention is claimed as a legal justification by the state or states seeking to intervene in the target state, but it keeps the state’s *international legal sovereignty* over its territory intact; whereas remedial secession is claimed as a right by the sub-state group affected by the gross human rights violations and, if the secession is carried out successfully, it removes the target state’s *international legal sovereignty* over the affected territory. Given these important differences, it is perfectly possible to accept the validity of one doctrine at the level of positive international law without accepting the validity of the other. But the reasons for invoking humanitarian intervention seem to be more complex. It could be argued that humanitarian intervention forms part of the overall context within which the right of remedial secession is to be accepted as part of positive international law, and it could be said to provide a crucial link between gross human rights violations and the willingness of international law to countenance interference with state sovereignty beyond the usual interference in *Westphalian sovereignty*. The problem is that humanitarian intervention is not a recognised part of positive international law. Sarvarian constructs a persuasive argument that the ongoing Syrian civil war conclusively proves that there is no such legal justification for the use of military force.¹²⁸ He argues that the Kosovo and Syria examples provide compelling evidence that the doctrine has not gained sufficient support to crystallise into a norm of customary international law. A large number of States, including the *Group of 77*¹²⁹, have explicitly rejected it. Furthermore, from an ethical perspective, Ayoob sounds a stark warning: “given the disparity in power among states, humanitarian intervention has the strong potential of becoming a tool for the interference by the strong in the affairs of the weak, with humanitarian concerns providing a veneer to justify such intervention”.¹³⁰ He notes the difficulties in separating “international will” from the selfish interests of powerful states, and the inherent dangers involved in allowing a state or a coalition of states to claim to speak and act on behalf of the international community. In his view:

¹²⁷ Vaughan Lowe and Antonios Tzanakopoulos, ‘Humanitarian Intervention’ in *The Max Planck Encyclopaedia of Public International Law* (2011), para. 3.

¹²⁸ Arman Sarvarian, ‘Humanitarian intervention after Syria’ 36 *Legal Studies* (2016) 20.

¹²⁹ Group of 77 South Summit, *Declaration of the South Summit* (10-14 April 2000) <http://www.g77.org/summit/Declaration_G77Summit.htm> accessed 19/02/2018, para. 54.

¹³⁰ Mohammed Ayoob, ‘Humanitarian Intervention and State Sovereignty’ 6 *International Journal of Human Rights* (2002) 8, 92.

“State sovereignty, as a legal and normative concept, acts as the cornerstone for the only institutional architecture capable of providing order within territorially defined political communities. It goes without saying that the preservation of domestic order is essential for the maintenance of international order. But preserving domestic order is also essential for the attainment of other values, including human rights, that most people hold dear”.¹³¹

From both a doctrinal and an ethical perspective, there are very good reasons to doubt the validity of humanitarian intervention at the level of positive international law.

International human rights law is primarily concerned with the relations between rulers and ruled, and this fact is insufficient to ground a right of remedial secession at the level of positive international law, particularly given the lack of state practice and the very tenuous evidence of *opinio juris*. To be clear, the argument is not that international law will *never* get involved in matters concerned with states’ *international legal sovereignty*. Clearly, it is possible for two or more states to agree to a treaty that, for example, transfers territory between them or creates a new state. It is also possible for international institutions to be established for the supervision of such arrangements. But there is nothing to suggest that states are obligated to agree to these things. The proper way to understand the linkage between self-determination and the erosion of state sovereignty is to recognise that self-determination does indeed have a remedial purpose¹³² and that, in Macklem’s words, “self-determination now mitigates adverse effects produced by how international law distributes sovereignty around the globe and authorises its exercise by sovereign states”.¹³³ As the next chapter will explain, this remedial purpose is normally exercised within the framework of existing states through the concept of internal self-determination.

3.4 Conclusion

¹³¹ *Ibid*, 92-93.

¹³² Canadian Supreme Court, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 124.

¹³³ Patrick Macklem, *The Sovereignty of Human Rights*, (OUP 2015), 182.

In conclusion, in cases of gross human rights violations, international law requires States to uphold their international obligations, including their human rights obligations. Whatever the proper interpretation of the Declaration on Friendly Relations, the lack of state practice strongly suggests that there is no right of remedial secession at the level of customary international law, whether or not pursuant to the right of self-determination.

Although it is true that international law no longer upholds sovereignty principles when they would serve as an accomplice to human rights violations, this is generally limited to sovereignty in its *Westphalian* sense. This eroded concept of sovereignty does not lead to a persuasive conclusion that remedial secession is part of positive international law.

Although there is no right of secession, the “peoples” entitled to self-determination are not synonymous with the state. Instead, the right belongs to the *population* of the state understood in a disaggregated sense. As the next chapter will demonstrate, the emphasis is on maximising the ability of all segments of society to freely pursue their economic, social and cultural development and to enjoy other human rights. This will usually occur within the state, via *internal* self-determination.

Although unilateral secession in both its primary right and remedial right variants is not a part of international law, secession is one option among many to be explored by states, sub-state groups, international and regional institutions, non-governmental organisations and others. In some cases, secession will be the most appropriate outcome from a human rights perspective and, in particular circumstances, domestic authority structures will be expected to take the possibility of secession seriously, even if they are under no obligation to accept and act upon secessionist claims. This will be explained in greater detail in the next chapter.

CHAPTER FOUR

4 Internal Self-Determination

The previous chapter on self-determination and secession concluded with several observations. First, the “peoples” entitled to the right of self-determination under common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR) refers to the whole population of existing territorial units (usually recognised States, but it might also be recognised non-self-governing territories or, in the case of State dissolution, federal entities), understood in a *disaggregated* sense. In other words, the concept of peoples is given a less monolithic meaning by considering the interests of the diverse groups that together make up the whole people of the territorial unit in question.¹ It will be recalled that the Kurds in Turkey have the right of self-determination by merit of the fact that, as a group, they are part of the *whole people* of Turkey. Second, the right of self-determination does not entail a right of unilateral secession, understood as the repudiation by a sub-state group of the state’s sovereignty over a particular piece of territory and the attempt by that sub-state group to establish a new state or to incorporate the affected territory into another state without the consent of the affected host state. In the colonial context, there was and is a right for the affected peoples to freely choose to establish a new independent state (or any other status), but this is a separate issue. Finally, it was noted that self-determination has a remedial purpose in the sense that it “mitigates adverse effects produced by how international law distributes sovereignty around the globe and authorises its exercise by sovereign states”² and that this remedial function is normally carried out within the framework of existing states through the concept of internal self-determination.

The purpose of this chapter is to explore the concept of internal self-determination. I shall argue that the right of self-determination, in its internal dimension, contains a number of different aspects. First, it has the ability to legitimise claims by minority groups and others that seek to increase their ability to participate politically, culturally, socially and economically in the life of the state; and that it does this without granting automatic rights to particular institutional

¹ Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism* in Christian Tomuschat, *Modern Law of Self-Determination* (Martinus Nijhoff 1993), 126-128.

² Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015), 182.

arrangements, such as territorial autonomy. Second, the right contains remedial aspects which aim to remedy the negative pathologies arising from international law's allocation of sovereignty around the globe. And third, the right contains a processual aspect that enjoins states to take seriously legitimate claims made by minority groups. Having assembled an abstract model of internal self-determination, this chapter will turn to the way in which internal self-determination tends to be worked-out in practice, via the techniques of *hybrid self-determination*. The chapter will also elaborate upon the links as well as the distinctions between self-determination, minority rights, non-discrimination, and other individual human rights standards. The overall aim is to present a workable framework of internal self-determination that will inform subsequent chapters on aspects of the Kurdish Question in Turkey.

4.1 *Self-determination beyond decolonisation and secession*

As noted in Chapter Two, the right of self-determination as it emerged during the decolonisation process was primarily conceptualised as a right of colonised peoples to freely choose to become independent states within their colonial boundaries. The internal dimension of self-determination arose in a dialectical relationship with this understanding of the right. Whereas anticolonial leaders were interested in bolstering strong, centralised nation-states (combined with some kind of federalism between independent states in order to reinforce them) in order to effectively remake a deeply unequal *international* order, Western international lawyers were interested in drawing attention to what was going on at the *sub-state* level behind the veil of postcolonial sovereignty. It was this *internal* understanding of self-determination that eventually gained widespread acceptance, whereas the necessity of radically remaking the international order has largely fallen by the wayside. For example, the *International Conference of Experts*, which was organised by UNESCO in 1998 to consider the implementation of the right of self-determination as a contribution to conflict prevention, pointed out that “self-determination itself is a human right and a prerequisite to the full enjoyment of other human rights,” and “the experts agreed that the right of self-determination was not confined to peoples formerly subjected to colonial rule, as some had argued before”.³ Other relevant sources support the opinion of the conference of experts. For example, General

³ Report of the International Conference of Experts Held in Barcelona from 21 to 27 November 1998, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, 4-5

Assembly Resolution 2625 links the right of self-determination with the possession of “a government representing the whole people belonging to the territory without distinction as to race, creed or colour”.⁴ Indeed, it can be argued that the very language of Article 1 of the ICCPR points to self-determination’s continuing relevance beyond the decolonisation context. As Crawford puts it, the language of Article 1 “suggests that self-determination is a continuing matter, not a once-for-all constitution of the state”.⁵

Legal scholarship, international instruments, and judicial discourse all recognise a distinction between *external* self-determination and *internal* self-determination. Broadly speaking, the former is concerned with peoples’ international status, and the latter is concerned with “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state.”⁶ In that sense, internal self-determination is a *relational* right because it is “about the relation between state and community”.⁷

4.2 A brief literature review

Several attempts have been made to add detail to the concept of internal self-determination. These range from narrow to broad interpretations, from the perspective of sub-state minority groups. At the narrow end of the spectrum, Hannum argued in 1990 that “The internal aspect of self-determination means that states and their peoples have the right to independence from foreign domination”.⁸ Internal self-determination is therefore “defined as independence of the whole state’s population from foreign intervention or influence”.⁹ On this reading of internal self-determination, the peoples of territorially defined units have “the right to overthrow the invaders and re-establish independence”¹⁰ but self-determination is not meaningfully concerned with relations between a people and its own state or government. The problem with

⁴ A formulation which was subsequently widened by the *Vienna Declaration and Programme of Action* to “without distinction of any kind.”

⁵ James Crawford, ‘Democracy and International Law’ 64 *The British Yearbook of International Law* (1993) 113, 116.

⁶ Canadian Supreme Court, *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, para. 126.

⁷ Benedict Kingsbury, *Reconstructing Self-Determination: A Relational Approach* in Pekka Aiko & martin Scheinin (eds.), *Operationalising the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights 2000), 26.

⁸ Hurst Hannum, *Autonomy, Sovereignty and Self-Determination* (University of Pennsylvania Press 1990), 48.

⁹ *Ibid*, 49.

¹⁰ *Ibid*, 48.

this narrow interpretation is that it does not fit with more recent developments. Indeed, the UN Human Rights Committee is clearly of the view that a state's internal constitutional and political processes are relevant to the exercise of the right¹¹ and according to a former member of the Committee it also asks states parties to the ICCPR to report "about the opportunities that its own population has to determine its own political and economic system. Virtually no states refuse to respond to probing comments and questions on internal self-determination, and the Committee is not told that no such right exists".¹² Furthermore, the UN Committee on the Elimination of Racial Discrimination explicitly links the right of self-determination with the "right to take part in the conduct of public affairs at any level".¹³ Thus, if Hannum's interpretation was sound at the time of writing, it seems too narrow today. The right to resist foreign occupation is certainly a crucially important aspect of the right of self-determination for peoples subjected to foreign occupation, such as the Palestinians, but it represents only the thin end of the wedge.

Alternatively, one might conceptualise self-determination as a democratic entitlement.¹⁴ In a well-known article, T.M. Franck argued that self-determination is "the historic root from which the democratic entitlement grew".¹⁵ According to Franck, this democratic entitlement meant "that governments, instituted to secure the 'unalienable rights' of their citizens, derive 'their just powers from the consent of the governed'".¹⁶ For Franck, "Self-determination postulates the right of a people organised in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement".¹⁷ Writing at the end of the Cold War, he noted that "The right now entitles people in all states to free, fair and open participation in the democratic process of governance freely chosen by each state".¹⁸ In a similar vein, Crawford argues that "in addition to its familiar role in the

¹¹ UN Human Rights Committee, *General Comment 12*, UN Doc. HRI/GEN/1/Rev.1 at 12 (1994), para. 4

¹² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994), 117.

¹³ UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 21*, (1996), para. 4.

¹⁴ For a good critique of the democratic entitlement thesis, see Susan Marks, *The Riddle of All Constitutions* (OUP 2000). Also see William Robinson, *Promoting Polyarchy: Globalization, US Intervention, and Hegemony* (CUP 1996); Noam Chomsky, *Democracy in the Industrial Societies* in Noam Chomsky, *Deterring Democracy* (Vintage 1992); Martti Koskenniemi, 'Intolerant Democracies: A Reaction' 37 *Harvard International Law Journal* (1996) 231.

¹⁵ Thomas M. Franck, 'The Emerging Right to Democratic Governance' 86 *The American Journal of International Law* (1992) 46.

¹⁶ *Ibid*, 46.

¹⁷ *Ibid*, 52.

¹⁸ *Ibid*, 59.

decolonization process, Article 1 [of the ICCPR] can be read as affirming the self-direction of each society by its people, and thus as affirming the principle of democracy at the collective level”.¹⁹ For both Crawford and Franck, this right is linked with a range of other rights, including freedom of expression. Links between self-determination and democracy are also recognised by key international institutions. The International Conference of Experts organised by UNESCO in 1998 noted “Self-determination is achieved by fully participatory democratic processes...”²⁰ and therefore “Self-determination is a process rather than an outcome. There is, in fact, no one prescribed outcome for the exercise of self-determination”.²¹ UN General Assembly Resolution 2625 again links self-determination with the possession of representative government.

At the broad end of the spectrum, one could argue that internal self-determination entails a right of sub-state groups to a set institutional arrangement, such as autonomy. This approach is adopted by Article 4 of the UN Declaration on the Rights of Indigenous Peoples. Of course, the precise content of this right, and the precise details of the autonomy arrangement, will vary depending on the particularities of each case; but the point remains that indigenous peoples *qua* peoples entitled to the right of self-determination have a right to some form of autonomy or self-government. The problem is that the right to autonomy is granted to a specific category of right-holders, namely indigenous peoples, and there is little to suggest that self-determination entails a right to specific arrangements of this sort beyond the context of indigenous peoples’ rights. As Thornberry has pointed out: “self-determination is a right, autonomy is not; autonomy is essentially a gift by the state... Autonomy may be a good idea, but it does not flow freely from the sources of international law as an obligation on states”.²²

4.3 *The three interlocking dimensions of internal self-determination*

¹⁹ James Crawford, *supra* n. 5, 116.

²⁰ *Supra* n.3, 7.

²¹ *Ibid*, 13.

²² Patrick Thornberry, *Self-Determination and Indigenous Peoples: Objections and Responses* in Pekka Aikio & Martin Scheinin (Eds.) *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights 2000), 56. For a more recent study, see Nora Ho Tu Nam & Yonatan Fessha, ‘Revisiting the Place and Use of Territorial Autonomy under International Law’, 25 *International Journal on Minority and Group Rights* (2018), 530.

4.3.1 *The participatory and legitimating aspect of internal self-determination*

The above overview shows that formulations of internal self-determination that focus on the right of the whole people of a state to resist foreign occupation are only at the thin end of the wedge. The contemporary right focuses in addition on states' internal constitutional rules and avenues for democratic participation. At the same time, "thick" formulations that posit automatic rights to particular institutional arrangements such as territorial autonomy have a weak basis in international law. The intermediate position that views internal self-determination as a majoritarian democratic entitlement is of only limited value to minority groups such as the Kurds, who ultimately seek a certain degree of separation from the majority in order to maintain and develop their language and culture. Moreover, democracy is not a univocal concept. As it developed in the West, the democratic system—dubbed *polyarchy* by scholars of democracy²³—has been described as one "in which a small group actually rules and mass participation in decision making is confined to leadership choice in elections carefully managed by competing elites."²⁴ It is doubtful whether any of the recognised sources of international law contain a right to polyarchy. Gregory Fox, for example, notes the "substantial variation among regions in the observance of democracy norms" and argued that "[t]his wide spectrum of commitment to democratic governance provides an uncertain foundation for a global norm."²⁵ What was true then is even more true in today's world of right-wing authoritarian internationalism, in which there is "a growing openness to considering alternatives [to democracy] which might be seen to offer a happier future."²⁶ More broadly, the fact that international law began to take the rights of minorities more seriously after the Cold War and the collapse of the former Yugoslavia justifies a reading of self-determination that supports and upholds those rights, rather than an exclusive focus on majoritarian democratic entitlements that can—and often do—legitimise the right of the majority to assimilate minorities.

²³ Robert Dahl, *Polyarchy: Participation and Opposition* (Yale 1977).

²⁴ William Robinson, *Promoting Polyarchy: Globalization, US Intervention, and Hegemony*, (Cambridge 2011), 49. Robinson perhaps downplays the limited but important relative autonomy of the political sphere from elite interests, see Ralph Miliband, *The State in Capitalist Society* (Merlin 2009).

²⁵ Gregory Fox, 'Democracy, Right to, International Protection', *Max Planck Encyclopedia of Public International Law* (2008), para. 36.

²⁶ Philip Alston, 'The Populist Challenge to Human Rights', 9 *Journal of Human Rights Practice* (2017), 5.

An alternative, and arguably more useful, conceptualisation of self-determination is advanced by Anaya. He argues that “self-determination comprises a standard of governmental legitimacy within the modern human rights frame,” and that this standard “entails a universe of human rights precepts extending from core values of freedom and equality and applying in favour of human beings in relation to the institutions of government under which they live”.²⁷ Self-determination therefore “provides a standard by which institutions of government and their attributes are measured, and by which many are found to be illegitimate or in need of reform in relation to particular groups”.²⁸ Anaya draws a distinction between the *substance* of the right of self-determination and the remedial *prescriptions* that may follow particular violations of the right. The former comprises two normative strains: a *constitutive* aspect and an *ongoing* aspect. In its *constitutive* aspect, self-determination “enjoins the episodic procedures by which the governing institutional order comes about”.²⁹ In this aspect, “core values of freedom and equality translate into a requirement that individuals and groups be accorded meaningful participation, commensurate with their interests, in procedures relating to the creation of or change in the institutions of government under which they live”.³⁰ It “requires that the governing order be substantially the creation of processes guided by the will of the people, or peoples, governed”.³¹ Although it does not dictate the outcomes of these participatory procedures, it does at least impose “requirements of participation such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned”.³² In its *ongoing* aspect, self-determination “requires that the governing institutional order itself be one in which individuals and groups live and develop freely on a continuous basis”³³ which is also expressed in common Article 1 of the ICCPR and ICESCR: “All peoples... freely pursue their political, economic, social and cultural development.”

This differs from the view that self-determination entails basic representative democracy because it links cultural integrity precepts with self-determination, resulting in a formulation that is attentive to the needs of diverse groups within the State. As Anaya puts it:

²⁷ James Anaya, *Self-determination as a Collective Human Right Under Contemporary International Law* in Pekka Aikio & Martin Scheinin (eds.) *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights 2000).

²⁸ *Ibid.*

²⁹ James Anaya, ‘A Contemporary Definition of the International Norm of Self-Determination’ 3 *Transnational Law & Contemporary Problems* (1993) 131, 145.

³⁰ *Ibid.*

³¹ James Anaya, *Indigenous Peoples in International Law* (OUP 1996), 81.

³² *Ibid.*, 82.

³³ *Ibid.*, 157.

“If the cultures of diverse groups are not valued, neither are their distinctive ways of life or interactive patterns which extend well into the social and political realms. Under such a perceptual gloss, freedom and equality may be considered satisfied by simple inclusion of the groups’ individual members as participants in political systems based on traditional Western liberal conceptions of democracy (or, until recently, Marxist proletarianism). But once diverse cultural groupings are acknowledged and valued, their associational patterns and community aspirations become factors that must be reflected in the governing institutional order if self-determination notions are to prevail”.³⁴

Together, these normative strains “seek to enjoin the constitution and functioning of the governing institutional order,” and can be deemed to apply universally³⁵ but the particular remedial *prescriptions* that flow from these universal normative will “vary according to the relevant circumstances and need not inevitably result in the formation of new states”.³⁶ Seen in this light, “The prescriptions to undo the classical institutions of colonization that survived into the twentieth century... do not themselves embody the *substance* of the right of self-determination; rather, they correspond with measures to *remedy* a *sui generis* deviation from the enjoyment of a right that existed in the prior condition of colonialism”.³⁷

Anaya’s distinction between the normative and remedial strains of self-determination is useful because it avoids one of the myths and misconceptions about nationalism and national conflicts, namely the myth that national conflicts can be solved by implementing a one-size-fits all territorial and institutional framework. Instead, as Brubaker explains, such political reconfiguration can end up reframing, recasting or even exacerbating national tensions rather than ameliorating them.³⁸ This mistaken belief is manifested in the ideal of national self-determination – that national conflicts can be solved by making state boundaries coincide with national units. But it is also manifested in certain ideas about internal self-determination that provide territorial autonomy arrangements to certain groups based on pre-defined criteria.

³⁴ *Ibid*, 155.

³⁵ *Ibid*, 12.

³⁶ *Ibid*.

³⁷ *Ibid*, 13

³⁸ Rogers Brubaker, ‘Myths and misconceptions in the study of nationalism’ in Margaret Moore (ed.), *National Self-Determination and Secession* (OUP 1998), 275.

Rather than conceptualising self-determination as a set remedy applied in pre-defined circumstances to pre-defined groups, it is necessary to create enough room to ameliorate national conflicts while being sensitive to local contexts. Although secession or territorial autonomy might be useful in context A, it might be unhelpful in context B.

The right of self-determination therefore functions as a *standard of governmental legitimacy* that provides a normative basis for justifying certain participatory arrangements and criticising others, depending on the extent to which they increase or decrease opportunities for all segments of society to participate in political, social, cultural and economic life. As Anaya puts it, the right of self-determination “provides grounds to reform existing state structures of government in appropriate circumstances”.³⁹ This, it is submitted, is guided by Marks’ “principle of democratic inclusion”⁴⁰ which is less about democratic forms and events, and more about combatting unjust exclusion and creating a bias in favour of “inclusory political communities”.⁴¹ According to Marks, this principle is informed by the project of “cosmopolitan democracy,” whereby “democracy is seen to entail not only a particular set of institutions and procedures, but also, and more generally, an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalise some citizens while empowering others”.⁴²

There is some support for this account of self-determination in judicial discourse. For example, in *Loizidou v Turkey*, the concurring judgment of Judge Wildhaber and Judge Ryssdal noted “where the modern right of self-determination does not strengthen or re-establish the human rights and democracy of *all persons and groups involved*, as it does not in the instant case, it cannot be invoked to overcome the international community’s policy of non-recognition of the [Turkish Republic of Northern Cyprus]”.⁴³ Both judges linked the right of self-determination with the emerging consensus that peoples may exercise their right of self-determination “if they are without representation at all or are massively under-represented in a undemocratic and discriminatory way”⁴⁴ and they appeared to understand democracy in a disaggregated, non-majoritarian sense.

³⁹ James Anaya, *supra* n. 31, 15.

⁴⁰ Susan Marks, *supra* n. 14.

⁴¹ *Ibid*, 109.

⁴² *Ibid*.

⁴³ ECHR, *Case of Loizidou v Turkey*, (Application No. 15318/89), 24.

⁴⁴ *Ibid*

At the international level, it is worth noting that UN Security Council Resolution 2118 on the situation in Syria adopted the language of self-determination: “It is for the Syrian people to determine the future of the country. All groups and segments of society in the Syrian Arab Republic must be enabled to participate in a national dialogue process. That process must be not only inclusive but also meaningful. In other words, its key outcomes must be implemented”.⁴⁵ Although the resolution elaborates upon the required democratic forms, it clearly views the concept of peoplehood in disaggregated terms – “all groups and segments of society” are what constitute the “Syrian people” – and it requires an inclusive process that will “Offer a perspective for the future that can be shared by all in the Syrian Arab Republic,” not just by the monolithic majority or dominant segments of society.

The link between self-determination and democracy should therefore be understood in the following way: self-determination is a standard of governmental legitimacy that requires, in its *ongoing* aspect, a governing order under which all groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis, and this standard of governmental legitimacy is guided by the principle of democratic inclusion. Participatory arrangements will be more legitimate if they expand the ability of groups to make meaningful choices; and they will be less legitimate (or illegitimate) if they thwart the ability of groups to make meaningful choices. Within this framework, one can garner normative support for a whole range of constitutional reforms depending on the circumstances, including, *inter alia*, calls for democratic governance or autonomy arrangements in favour of minority groups. In other words, although one cannot derive automatic *rights* to, for example, territorial autonomy from self-determination outside of the decolonisation and indigenous rights context, one can obtain *legitimacy* for such claims where they serve the instrumental purpose of maximising participation in political, cultural, economic and social life.

4.3.2 *The remedial aspect of internal self-determination*

⁴⁵ UN Security Council, Resolution 2118 (2013) UN Doc. S/Res/2118.

As noted above, it is widely recognised that the right of self-determination contains remedial elements.⁴⁶ As noted in Chapter Three, these remedial elements do not go so far as to generate a right to unilateral secession, but they do nonetheless engage with the negative pathologies arising from the way in which international law allocates—and justifies the use of—sovereignty around the globe.⁴⁷ In this way, the right of self-determination is concerned with the concrete injustices experienced by minority groups within existing nation-states, who are typically oppressed during the process of nation-building and easily cast as the *other* against which the identity and unity of the majority is built. As detailed in Chapter Two, the right of self-determination in the decolonisation context represented the universal victory of the nation-state form, and this very form has a marked tendency to give rise to the oppression of minority groups. So where, for example, a minority group seeks a measure of territorial or cultural autonomy in order to open-up a space to maintain and develop its non-dominant language and culture, the right of self-determination lends strong normative support to the claim. In effect, rather than (or as well as) parsing abstract legal definitions of peoplehood and searching for rights to particular outcomes on an abstract level, it is necessary to pay attention to the particularities of self-determination claims and the historical contexts in which they arise, and to build an argument to the effect that international law should (or should not, as the case may be) engage with them. Internal self-determination is therefore a right that serves to legitimise reorientations of the relationship between the state and its minority communities in a direction that allows for the increased participation of those minority communities, *particularly* when their limited participation is bound-up with the way in which international law allocates sovereignty around the globe.

4.3.3 *The processual aspect of internal self-determination*

As well as performing the abovementioned *legitimising* and *remedial* functions, the right of self-determination also has a *processual* function. In this aspect, self-determination enjoins state authorities to take legitimate claims made by minority groups seriously.⁴⁸ In *Reference*

⁴⁶ Canadian Supreme Court, *supra* n. 6, para. 124; also see Frederic Kirgis, 'The Degrees of Self-Determination in the United Nations Era', 88 *The American Journal of International Law* (1994), 304.

⁴⁷ Patrick Macklem, *supra* n. 2.

⁴⁸ See Jan Klabbers, 'The Right to be Taken Seriously: Self-Determination in International Law', 28 *Human Rights Quarterly* (2006), 186.

Re Secession of Quebec, the Canadian Supreme Court held that there existed a duty to negotiate, contingent on a clearly expressed free choice made by one part of the federal state of Canada (in that case, Quebec) to secede. This duty to negotiate would “demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada”⁴⁹ but it would not “impose an obligation on the other provinces and federal government to accede to the secession of a province”⁵⁰ and neither would it “impose no obligations upon the other provinces or the federal government”.⁵¹ The processual aspect of self-determination is understood not in terms of the simple exercise of power by the majority (or, for that matter, by the minority) but as an ongoing process in which each side is taken seriously. More broadly, the Supreme Court opined that “a functioning democracy requires a continuous process of discussion,” which “necessitates compromise, negotiation and deliberation”.⁵² Furthermore, in the case of *Chassagnou and Others v. France*, the Grand Chamber of the European Court of Human Rights held that “pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’”. Although individual interests must on occasion be subordinated to those of the group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position”.⁵³ In other words, states are not at liberty to ignore or treat with disdain the legitimate self-determination claims of minority groups. They are not at liberty to present the views of the majority as a trump card against the freely expressed wishes of a minority group. But at the same time, states are under no legal obligation to accede to the self-determination claims of minority groups, no matter the weight of normative support lent to particular claims by the right of self-determination in its *participatory* and *remedial* aspects. This is a manifestation of the fact that the right of self-determination does not entail an automatic right to secession or to autonomy.

Internal self-determination therefore has three interlocking functions. First, it has a *legitimising function*, which is to say that oppressed minority groups seeking constitutional change (such as the introduction of a territorial autonomy arrangement) can obtain normative support from the right of self-determination to the extent that their claims will enable them to more freely

⁴⁹ Canadian Supreme Court, *supra* n. 6, para. 87.

⁵⁰ *Ibid*, para. 90.

⁵¹ *Ibid*, para. 92.

⁵² *Ibid*, para. 68.

⁵³ European Court of Human Rights, *Case of Chassagnou and Others v. France* [1999] ECHR 22 (Application No. 28443/95), para. 112.

participate in political, cultural, social and economic life. Second, it has a *remedial function* insofar as these claims receive added normative support when they are pursued in order to remedy the adverse consequences arising from how international law allocates sovereignty around the globe. Third, it has a *processual function*, which is to say that the right enjoins states to engage in good faith with such claims when they are made. There is, however, little evidence to suggest that the internal dimension of self-determination entails an automatic right to particular institutional outcomes, such as territorial autonomy.⁵⁴

4.4 *Internal self-determination in practice: The art of hybrid self-determination*

The understanding of self-determination as a normative support for the accommodation of group demands for effective participation is reflected in Christine Bell's concept of hybrid self-determination. Based on her in-depth examination of peace agreements post-1990, Bell argues that "the centre-piece of peace agreements is the provision they make for the holding and exercising of political power".⁵⁵ Peace agreements, she argues, focus around three core techniques: *state redefinition*, *disaggregation of power*, and *dislocation of power*—collectively termed *hybrid self-determination*.⁵⁶ These peace agreements operate as international transitional constitutions and are clearly related to both international legal agreements and domestic constitutions, without neatly fitting into either category. They are "outside the traditional concepts of international law conceived of as law between states," on the one hand, and "the internationalisation of the settlements also takes them outside traditional concepts of the constitution as the state's internal social contract"⁵⁷ on the other. The hybridity of these arrangements also arises from the mixture of elements of internal self-determination and external self-determination.

The first technique of hybrid self-determination (state redefinition) involves the articulation of a new relationship between people and state at the level of symbolism and rhetoric. It typically uses constitutional language to articulate new principles such as inclusiveness or democratic renewal.⁵⁸ This symbolic redefinition of the state has a performative power that enables and

⁵⁴ Nora Ho Tu Nam & Yonatan Fessha, *supra* n. 22.

⁵⁵ Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008), 105.

⁵⁶ *Ibid*, 106.

⁵⁷ *Ibid*, 122-23.

⁵⁸ *Ibid*, 106.

requires the disaggregation of state power. The second technique (disaggregation of power) addresses the state's internal sovereignty and aims to accommodate group demands for effective participation. In Bell's words:

“At the level of institutional detail, peace agreements disaggregate power by re-conceptualising state governance and jurisdiction as capable of being disaggregated into a wide variety of territorial, functional, and identity-based institutional innovations, so as to accommodate competing group demands for effective participation”.⁵⁹

The third technique (dislocation of power) involves the dislocation of power from the pre-existing *demos* of the territorially defined state and tampers “with the notion of a state as having an automatic sovereignty and a unitary people tied up with its territorial integrity”.⁶⁰ At its most fundamental level, this “assists the disaggregation of power by introducing an international element into domestic governance”.⁶¹ This might involve “international supervision that conditions full sovereignty on the building of political and legal institutions that will disaggregate power, to ensure that all groups are accommodated”.⁶² In this way, power is dislocated across state borders, shared between more than one state, or international actors are placed at the heart of new arrangements. In other words, “Dislocated power addresses the state's external sovereignty by attenuating it”.⁶³ Power might also be dislocated by providing the trappings of statehood to a sub-state group and/or making the continued existence of the state contingent upon a referendum on secession to be held at some point in the future. One example of dislocated power in this sense is the autonomous island of Bougainville, which technically exists within the confines of the sovereign state of Papua New Guinea. As Bell points out, the Agreement on Bougainville leaves the issue of sovereignty open to further negotiation and provides for a future referendum on Bougainville's future political status⁶⁴, therefore neither Bougainville nor Papua New Guinea has statehood in the traditional sense.

All three components of hybrid self-determination are linked in the following way:

⁵⁹ *Ibid*, 106.

⁶⁰ *Ibid*, 107.

⁶¹ *Ibid*.

⁶² *Ibid*.

⁶³ *Ibid*, 106.

⁶⁴ *Ibid*, 111-12.

The redefinition of the nature of the state as committed to inclusion and equality enables and requires the disaggregation of power in governance. Conversely, the disaggregation of power is the tangible outworking of the new state's rhetorically changed nature.⁶⁵

Hybrid self-determination combines international law with domestic constitutional law and provides peace agreements with a level of normative force. This normative force derives from "the ability to narrate hybrid self-determination as consistent with the established self-determination law (the *lex lata*), while simultaneously offering a development that reconciles the old law's contradictions and indeterminacies".⁶⁶ This reconciliation occurs in the following way:

Peace agreement hybridity offers a complex disaggregation of statehood, territory, peoples, and nationalities, so that these can be reconstituted in a broad variety of permutations to enable the accommodation of complex, overlapping and mutating group identities and competing conceptions of the state.⁶⁷

Hybrid self-determination acts as a kind of bridge between the peace agreement and the normative universe of international law not because there is a *right* to hybrid self-determination but because creative attempts to disaggregate state power and to accommodate group identities can be justified as compatible with the right of self-determination. In other words, the practice of hybrid self-determination is the concrete working-out of the abstract dimensions of the right of self-determination.

Together, these strands of hybrid self-determination can help to meet the increasingly prevalent demands of sub-state groups to recognition in constitutional terms and to self-determination *within* the state. As Tierney points out, sub-state nationalists seek to reimagine state sovereignty as a relationship between *peoples* (rather than *a people*) and the state. This reimagined sovereignty "must be one which is flexible enough to accommodate a plurality of peoples or *demos*, each of which might bring with it a differing vision and a variegated set of

⁶⁵ *Ibid*, 114.

⁶⁶ *Ibid*, 219.

⁶⁷ *Ibid*, 231.

claims concerning where sovereignty lies within the State”.⁶⁸ In the terms of the Kurdish movement in Turkey, this reflects their aim to defend and protect “pluralism against monism”⁶⁹ or, in other words, the Kurdish movement challenges what Tierney refers to as “a unitary construction of the *internal* sovereignty of the state, centred around a singular conception of the *demos*”.⁷⁰ It is the concept of the state as bound-up with a singular, monolithic nation (the nation-state), rather than the continued existence of the state of Turkey *per se*, that is the problem to be overcome.

A good example of some components of hybrid self-determination in practice is the creation of the Kurdistan Regional Government in Iraq. Although not strictly a peace agreement, the Iraqi constitution draws on these techniques in order to accommodate groups that had been fighting each other over a long period of time, and it was implemented at a time when various Iraqi groups were still engaged in violent conflicts. Article 1 of the Iraqi Constitution provides that the constitution itself is a guarantor of the unity of Iraq, and Article 3 recognises that Iraq is “a country of multiple nationalities, religions and sects.” Article 12 provides that the Iraqi flag, national anthem and emblem “shall be regulated by law in a way that symbolises the components of the Iraqi people.” These three articles are examples of *state redefinition*. Article 4 establishes that the Arabic and Kurdish languages are the two official languages of Iraq, thereby recognising a new relationship between people and state (and recognising an important aspect of Kurdish identity). The constitution also enumerates a limited set of powers belonging to the federal government (Article 110), and a limited set of powers to be shared between the federal government and the regional authorities (Article 114). Any powers not enumerated belong to the authorities of the regions and governorates not organised in a region (Article 115). The region of Kurdistan is recognised under Article 117 and required to adopt its own constitution in Article 120. Alongside several other functional redistributions of power (such as the right to be educated in mother tongues including Turkmen, Syriac, and Armenian under Article 4), these are examples of the redistribution of state power along *territorial* lines. The scope of devolved power granted to Kurdistan includes power over such things as “police,

⁶⁸ Stephen Tierney, ‘Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State’ 54 *International & Comparative Law Quarterly* (2005) 161, 162.

⁶⁹ ANF News, *Full text of the joint statement of detained MPs of the HDP at court*, <<http://anfenglish.com/news/full-text-of-the-joint-statement-of-detained-mps-of-the-hdp-at-court>> accessed 23/12/16.

⁷⁰ Stephen Tierney, *supra* n. 68, 175.

security forces, and guards of the region,” (Article 121(5)), which is widely understood as a reference to the armed Kurdish *Peshmerga* force. The Kurdistan region also pursues its own diplomacy alongside the Iraqi federal government’s diplomacy⁷¹ and visitors to the region will know that visas and immigration issues are dealt with at the regional level. These powers strongly suggest that Kurdistan is provided with many of the trappings of statehood and is often referred to by experts as a quasi-state. Michael Gunter goes so far as to describe the Kurdistan Region of Iraq as “the most successful model of an actual functioning Kurdish state in modern times”.⁷²

Another illustrative example is the Dayton Agreement, which redefines Bosnia and Herzegovina as a pluralist society, disaggregates power to the Entities, and dislocates power by entrenching human rights guarantees, specifically the Council of Europe’s ECHR, and granting them authority above all other law, and by granting the Entities the right to establish special parallel relationships with neighbouring states. Although Bosnia and Herzegovina is recognised as a sovereign state and entitled to respect for its territorial integrity, its sovereignty is both internally and externally blurry.

4.5 *Methods of sovereignty disaggregation: some broad outlines*

There are many different ways in which state power could be disaggregated in Turkey. A selective range of specific possibilities and how these relate to international law will be considered in subsequent chapters. For now, it will be useful to attempt a broad categorisation of different forms of autonomy. The categorisation is necessarily broad because, as Ghai points out, “no solid theory underpins autonomy, because autonomy arrangements are very often very pragmatic ad hoc solutions that escape generalisations”.⁷³

⁷¹ According to the KRG’s Head of Foreign Relations, Falah Mustafa, the KRG has formed diplomatic relations with 36 states around the world. See Rûdaw, *KRG building diplomatic ties while keeping ISIS top war priority, says FM* <<http://rudaw.net/english/kurdistan/061220163>> accessed 20/12/16.

⁷² Michael Gunter, *Out of Nowhere: The Kurds of Syria in Peace and War* (Hurst & Co. 2014), 47.

⁷³ Yash Ghai, *Practising Self-government: A Comparative Study of Autonomous Regions* (CUP 2013), 2.

Suksi has helpfully elaborated upon the conceptual distinctions between territorial autonomy, cultural autonomy, personal autonomy, and functional autonomy.⁷⁴ Territorial autonomy involves “granting law-making powers on at least some substantive issues to the population... of a geographically delineated area.” An example of this is Northern Ireland, which under the Good Friday Agreement has its own assembly capable of exercising executive and legislative authority.

Cultural autonomy is understood as the “right to self-rule, by a culturally defined group, in regard to matters which affect the maintenance and reproduction of its culture”.⁷⁵ Cultural autonomy requires the state to erect a reserved domain for internal management by the cultural group and “seems to imply self-government by a distinct legal personality, separated from the legal personality of the state and other legal persons”.⁷⁶ Cultural autonomy goes further than personal autonomy because the former involves an obligation on the state to treat decisions of the institutions of the cultural group as authoritative, whereas the latter implies “freedom of association as a general civil right in the horizontal dimension”.⁷⁷ Perhaps the most well-known exponent of cultural autonomy was Karl Renner who, in 1899, published *State and Nation*. Renner’s argument was concerned with “the modalities which allow the peaceful coexistence of several national groups” within the same territorial unit or state.⁷⁸ He argued that the *personality principle* was a useful way of solving the problem: the nations should be given juridical existence as personal associations separate from the state, which he compared favourably with the *territorial principle*, which holds that “if you live in my territory, you are subject to my domination, my law and my language!”⁷⁹ Nimni summarises the concept in the following way:

“... Renner’s model requires that all citizens declare their nationality when they reach voting age. Members of each national community, whatever their territory of residence, would form a single public body or association endowed with a legal personality,

⁷⁴ Marku Suksi, ‘Functional Autonomy: The Case of Finland with Some Notes on the Basis of International Human Rights Law and Comparisons with Other Cases’ 15 *International Journal on Minority and Group Rights* (2008) 195.

⁷⁵ Asbjørn Eide, cited in Marku Suksi, *ibid*, 196.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, 197.

⁷⁸ Karl Renner, *State and Nation* in Ephraim Nimni, *National-Cultural Autonomy and its Contemporary Critics* (Routledge 2005), 16.

⁷⁹ *Ibid*, 28.

collective rights, segmental sovereignty and competences to deal with all national cultural affairs in the context of a single multinational state”.⁸⁰

This is strongly reminiscent of the Ottoman *millet* system and the cultural autonomy it granted to religious communities such as Orthodox Greeks and Jews.

Functional autonomy could involve organising the group into a private form or forms (which could include anything from a business corporation to a school) and then delegating particular public functions to that private corporation. Examples include the delegation of powers to private minority schools, or school boards containing members of the minority group, allowing them to educate children in their mother tongue as part of the state education system. Functional autonomy might also occur within the State’s ordinary line administration: the regular administrative agencies might be “organised so as to contain separate branches for the majority and the minority”.⁸¹ The latter form of functional autonomy “produces a relatively integrated administrative structure for the minority, but requires that it is created through public law rules of the state in question”.⁸²

In broader terms, these forms of autonomy can be categorised as *territorial autonomy* and *non-territorial autonomy*. The key difference between these forms of autonomy is that the former defines the autonomous entity in territorial terms whereas the latter defines the autonomous entity in ‘personal’ terms regardless of where they live on the territory of their host State.⁸³

There are clearly important differences between the different categories of autonomy, but their core, common property is that in appropriate circumstances they can take the edge off the destructive potential of the nation-state, which has a tendency to ignore or paper over cultural differences and, in Benedict Anderson’s memorable phrase, stretch “the short, tight skin of the nation”⁸⁴ over a culturally diverse state.

⁸⁰ Ephraim Nimni, *The National Cultural Autonomy Model Revisited* in *Ibid*, 11.

⁸¹ Marku Suksi, *supra* n. 74, 89.

⁸² *Ibid*.

⁸³ Stefan Wolff and Marc Weller, ‘Self-determination and autonomy: a conceptual introduction’ in Stefan Wolff and Marc Weller (eds), *Autonomy, Self-governance and Conflict Resolution: Innovative approaches to institutional design in divided societies* (Routledge 2005), 12-13.

⁸⁴ Benedict Anderson, *Imagined Communities*, (Verso 2006), 86.

Returning to the theme of hybridity, it is very often the case that hybrid self-determination arrangements will incorporate all or many of these different participatory categories in novel and creative ways, depending on the overall circumstances. In the case of the Kurds in Turkey, where a considerable proportion of the Kurdish population resides outside of the majority Kurdish territories in the South-east, a durable settlement will probably have to rely on several different arrangements spanning a number of the above categories. For example, territorial autonomy in the majority Kurdish areas might be complemented by functional autonomy for certain educational establishments elsewhere in Turkey. On the other hand, the need to accommodate non-Kurdish inhabitants of those regions might involve some form of personal autonomy or cultural autonomy for those groups.

4.6 *Overlaps and links with individual rights standards*

In practice, as Section III will show, claims made by minority groups cut across a wide range of human rights categories. The triumvirate of self-determination, individual minority rights, and non-discrimination are usually at the core of such claims. Other individual rights standards also interact with particular aspects of typical minority claims, depending on what is at stake. For example, in *Saramaka People v. Suriname*—a case concerning the award of logging and mining concessions on lands possessed by the Saramaka people without their full and effective consultation—the Inter-American Court of Human Rights held that states are required to take special measures to protect the property rights of indigenous and tribal communities, which meant that the Saramaka people were entitled to “enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied”.⁸⁵ The Court identified a connection between the development and preservation of the Saramaka people’s culture and their rights to ancestral territories, which were protected by the right to property under Article 21 of the American Convention on Human Rights. In reaching its decision on the scope of Article 21 *property rights*, the Court drew on the rights to *non-discrimination*, *minority rights*, and *self-determination*. The group-based claim in *Saramaka* therefore cut across four interlocking human rights categories.

⁸⁵ Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname* (2007), para. 95.

The next subsections will elaborate on some of the links and differences between the triumvirate of rights at the core of such claims. Later chapters on aspects of the Kurdish Question will similarly engage with relevant individual rights standards that form part of the normative penumbra around the group right of self-determination.

4.6.1 Equality

The right to equality is one of the underlying rationales of many self-determination claims, the idea being that a minority is, by dint of its non-dominance, not equal with other, dominant groups within the state. In the *Minority Schools in Albania* case the Permanent Court of International Justice (PCIJ) explained that the idea underpinning the inter-war minority rights treaties was to secure for certain minorities “the possibility of living peaceably alongside [the population of the state] and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs”.⁸⁶ In order to achieve that objective, it was necessary to “ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the state”.⁸⁷ The Court held that this requirement was closely linked with the need to “ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics,” because “there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority”.⁸⁸ The Court in that case drew an important and lasting distinction between equality in fact and equality in law, explaining that “Equality in law precludes discrimination of any kind, whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations”.⁸⁹ The Court further explained that it was easy to imagine cases where formally equal treatment in law of the majority and the minority, whose situations and requirements were different, would result in inequality in fact.

⁸⁶ PCIJ, *Minority Schools in Albania*, (Advisory Opinion, 1935), 17.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*, 19.

Equality considerations often form at least part of the basis for self-determination claims in the form of particular constitutional arrangements such as territorial autonomy. One purpose of such an autonomy regimes is to create the necessary space for particular groups to mobilise their strength and reintegrate into the state *on equal terms* with the rest of the population.⁹⁰ This way of understanding equality can be contrasted with “liberal” models that emphasise the role of equality in erasing differences between atomised individuals.⁹¹ As Requejo explains, one particular variant of democratic liberalism emphasises the importance of universal individual rights applied without discrimination, whilst distrusting the very notion of collective rights.⁹² This form of equality is usually labelled *formal* equality and it is arguably *illiberal* to the extent that it leads in practice to discrimination against particular minority groups. It oppresses them by assuming that they can be stripped of their cultural specificities and subsumed within a larger *demos* which is inevitably saturated in the cultural values of the dominant or majority cultural group. As Requejo puts it:

“For the minority nations, the price to pay for equality of citizenship often has been a situation of inequality in terms of linguistic and cultural personality in the public sphere. In other words, citizenship does not come at the same cultural price for each and every one of the different national groups within liberal democratic polities”.⁹³

4.6.1.1 *Formal equality*

This is not, however, to suggest that formal legal equality is always irrelevant to minority claims. For example in *Waldman v Canada*, the UN Human Rights Committee took the view that there was no reasonable and objective basis for publicly funding Roman Catholic schools without extending the same benefit to Jewish schools: “if a State party chooses to provide public funding to religious schools, it should make this funding available without

⁹⁰ Bhikhu Parekh, ‘A Case for Positive Discrimination’ in Bob Hepple & Erika Szyszczak (eds.), *Discrimination: The Limits of the Law* (Mansell Publishing 1992).

⁹¹ See, for example, Nimni’s criticism of “inflexible Canadian liberals” and his claim that affirmative action principles aim to erase differences based on sex, gender and ethnicity: Ephraim Nimni, ‘The National Cultural Autonomy Model Revisited’ in Ephraim Nimni (ed.) *National-Cultural Autonomy and its Contemporary Critics* (Routledge 2005), 7.

⁹² Ferran Requejo, *Multinational Federalism and Value Pluralism: The Spanish Case* (Routledge 2005), 22-24.

⁹³ *Ibid*, 22.

discrimination”.⁹⁴ The failure to extend the benefit to Jewish schools led to a violation of Article 26 of the ICCPR, which prohibits discrimination. However, the discrimination identified in *Waldman* could equally have been eradicated by not providing funding to *any* religious schools. In other words, for formal legal equality to be useful to minority groups, there must be a right or a benefit enjoyed by other groups for them to grapple onto. Formal notions of equality have little positive to say when a group demands to be treated *differently* or when they demand positive action from the state in order to tackle *structural* causes of inequality.

In fact, legitimate demands for differential treatment might be ruled-out by an overly strict adherence to the formal notion of equality. For example, in *Chapman v. The United Kingdom* the majority of the Grand Chamber of the European Court of Human Rights took the view that according different treatment to Roma people *vis-à-vis* non-Roma people who were unlawfully stationed at a caravan site “would raise substantial problems under Article 14 of the Convention”⁹⁵ notwithstanding the fact that, as six dissenting judges argued, there were clear differences between the situations of the Roma and non-Roma. Again, in *Gerhardy v. Brown*⁹⁶ the Australian Supreme Court took the view that a law designed to protect the territorial rights of indigenous groups was discriminatory notwithstanding the fact that the law’s aim was to remedy inequalities resulting from white settlement in Australia.

4.6.1.2 *De facto equality*

To this variant of democratic liberalism, another model provides for the protection and development of cultural differences in the public sphere. It holds that without constitutional recognition of national minorities and without some measure of minority self-government, there arises discriminatory bias against national minorities.⁹⁷ In this more liberal model, the principle of equality is said to *require* the constitutional recognition and protection of

⁹⁴ Human Rights Committee, *Waldman v Canada*, Communication No. 694/1996 (1999), UN Doc. CCPR/C/67/D/694/1996, para. 10.6.

⁹⁵ ECHR *Case of Chapman v. The United Kingdom*, (2001) (Application No. 27238/95), para. 95.

⁹⁶ *Gerhardy v. Brown* (1985) 59 A.L.J.R. 311. For commentary, see Wojciech Sadurski, ‘Gerhardy v. Brown v. The Concept of Discrimination: Reflections on the Landmark Case that Wasn’t’ 11 *Sydney Law Review* (1988) 5.

⁹⁷ *Ibid*

differences. This understanding of equality requires states to take special measures in order to combat the structural causes of discrimination and to secure substantive, rather than merely formal, equality in the enjoyment of all human rights.⁹⁸ Contrary to judgments in cases like *Gerhardy v. Brown*, it views the adoption of special measures in favour of particular groups or individuals as integral to the very meaning of non-discrimination, rather than as violations of it, when those measures are aimed at securing substantive equality.

At the international level, the UN Human Rights Committee noted in its General Comment 18 that there is a difference between equality in law and equality in fact, and said “the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate *conditions* which cause or help to perpetuate discrimination prohibited by the covenant”.⁹⁹ The focus here is on the word “conditions”, which suggests that the states are obligated to take positive measures to tackle the underlying structural conditions that lead to inequality, such as racism, rather than merely acting with an even and non-discriminating hand whenever they implement general policies or laws (on this, more below). In that connection, the Committee noted that not every difference in treatment will constitute discrimination “if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant”.¹⁰⁰ Furthermore, the International Convention on the Elimination of All Forms of Racial Discrimination, which defines racial discrimination in Article 1(1) as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms..” explicitly *requires* states parties under Article 2(2), when the circumstances so warrant, to take special measures to “ensure the adequate development and protection of certain racial groups and individuals belonging to them,” provided those special measures do not entail as a consequence the maintenance of unequal or separate rights for different racial groups “after the objectives for which they were taken have been achieved”. The precise detail of the required special measures is to be determined by the state, subject to the Committee’s oversight, but in general they must be “appropriate to the situation to be remedied, be legitimate, necessary in a

⁹⁸ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32*, (2009), para. 6.

⁹⁹ Human Rights Committee, *General Comment No. 18* (1989), para. 10.

¹⁰⁰ *Ibid*, para. 13

democratic society, respect the principles of fairness and proportionality, and be temporary”¹⁰¹ and the beneficiaries may be groups or individual members thereof.

The main difference between the obligation to take special measures in order to secure *de facto* equality, and minority rights, is that special measures taken to secure *de facto* equality *must be of a temporary nature* and the aim is to overcome an obstacle to the equal enjoyment of human rights.¹⁰² Minority rights (as will be explained below), on the other hand, might entail *permanent* measures aimed at the protection and development of minority identities, languages, and cultures. These features of minority groups are not viewed as obstacles to be overcome via temporary measures, but as things to be cherished and accommodated.

4.6.1.3 Indirect discrimination

In the important case of *Thlimmenos v. Greece* the ECtHR ruled that “The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is... violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different”.¹⁰³ In the later case of *DH and Others v. The Czech Republic* the Court held that where the applicant can raise a *prima facie* issue of discrimination (where a rule formulated in a neutral manner in fact has a disproportionately negative impact on a particular group) then the burden of proof shifts to the state, which must show that the measure is justified.¹⁰⁴ Crucially, the obligation to provide justifications for *prima facie* discrimination arises whether or not the state intended to discriminate against the applicant.¹⁰⁵ The claim in this case was that a general rule led to less favourable treatment without objective or reasonable justification. As Fredman’s puts it, the Court recognised that “equal treatment can entrench disadvantage in situations of antecedent inequality,” and that the concept of *indirect discrimination* acknowledged by the Court “focuses on inequality of results rather than inequality of treatment, unless it can be justified”.¹⁰⁶ The necessity of showing that

¹⁰¹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32*, (2009), para. 16.

¹⁰² *Ibid*, para. 15.

¹⁰³ ECHR *Case of Thlimmenos v. Greece*, (2000) (Application No. 34369/97), para. 44.

¹⁰⁴ ECHR *Case of DH and Others v. The Czech Republic*, (2007) (Application No. 57325/00).

¹⁰⁵ *Ibid*, para. 194.

¹⁰⁶ Sandra Fredman, ‘Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights’ 16 *Human Rights Law Review* (2016) 273, 279.

an indirectly discriminatory measure is justified ought to bring the group dimension to bear when states are formulating general policies, requiring them to consider the impact that certain measures will have on particular groups and individual members thereof.¹⁰⁷ The obligation to treat different people differently, when necessary, implies that states should take into account the diverse conditions of particular groups and individuals when formulating laws and policies for general application.

But the notion of indirect discrimination has its limits. One important limit, particularly from the perspective of the ECHR, is that the Court tends to view discrimination from the perspective of the perpetrator rather than the victim. From the perpetrator's perspective, discrimination is all about actions inflicted on a victim by a perpetrator; whereas from the victim's perspective, discrimination is more about the objective conditions of life, including lack of jobs, money, housing, and opportunity.¹⁰⁸ The two perspectives yield different strategies for solving the problem of inequality: the perpetrator perspective focuses on neutralising the inappropriate conduct of public authorities, whereas the victim perspective focuses on eliminating the conditions associated with discrimination and the affirmative actions required to eliminate or alter those conditions.¹⁰⁹ Seen through this lens, cases like *DH and Others v. The Czech Republic* expand the concept of conduct to include the formulation of ostensibly neutral rules that in fact have a negative impact on members of a particular group, whether or not that negative impact was intended or foreseen. In certain cases, a failure to accommodate the affected individuals via different treatment will violate the right to equality. But it is difficult to find examples of the ECtHR imposing legal obligations to take affirmative action to tackle the conditions associated with discrimination, such as racism. One possible (but limited) example is *Ciorcan and Others v. Romania*, where the Court held that when investigating violent incidents carried out by private individuals, the State has an obligation to "take all reasonable steps to unmask any racist motives and to establish whether or not ethnic hatred or prejudice may have played a role in the events"¹¹⁰.

¹⁰⁷ Gaetano Pentassuglia, *Minorities in International Law: An Introductory Study* (Council of Europe 2003), 260.

¹⁰⁸ Alan Freeman, *Legitimising 'Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine'* 62 *Minnesota Law Review* (1978) 1049.

¹⁰⁹ *Ibid.*

¹¹⁰ ECHR *Case of Ciorcan and Others v. Romania*, (2015) (Application No. 29414/09) at para. 158

4.6.1.4 Self-determination arrangements and non-discrimination

As the foregoing analysis makes clear, only the most dogmatically formal understanding of equality holds that states cannot differentiate between certain categories of individuals and groups for legitimate reasons. Indeed, states are under a legal obligation to do so if their ostensibly neutral actions indirectly discriminate against minority groups, and signatories of the CERD (including Turkey) are under an obligation to take special measures (on a temporary basis) in order to secure *de facto* equality. Therefore, the introduction of certain forms of autonomy—whether cultural or territorial—to the benefit of particular minority groups does not constitute a violation of the non-discrimination norm (but at the same time, such institutional arrangements are not *required* by the norm, since they are permanent). As the ECtHR put it in the *Belgian Linguistics* case, differences in treatment are permitted as long as they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹¹¹ More specifically, distinctions in treatment will not violate the right to equality if they “are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest strike a fair balance between the protection of the interests of the community and respect for the right and freedoms safeguarded by the Convention”.¹¹² Similarly, the Committee on the Elimination of Racial Discrimination repeats the by now familiar mantra that differential treatment is permitted as long as it is objectively and reasonably justified.¹¹³ Moreover, the underlying normative commitments contained in substantive understandings of non-discrimination—namely commitments to the equal dignity of all human beings¹¹⁴ and the equal right to enjoy human rights—inform other rights which, unlike the right to *de facto* equality, aim at *permanent* measures of accommodation for minority groups.

4.6.2 Minority rights and cultural rights

Article 27 of the ICCPR provides a right of members of minority communities to enjoy their own culture, to profess and practise their own religion, or to use their own language. The article

¹¹¹ ECHR Case “*Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*” v *Belgium* (1968) (Application No. 1474/62).

¹¹² *Ibid.*, 40.

¹¹³ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32*, (2009), para. 8

¹¹⁴ *Ibid.*, para. 6.

is couched in negative terms (persons belonging to such minorities “shall not be denied” these rights) and is an individual right¹¹⁵ but the UN Human Rights Committee has expanded on the article in its General Comment 23. The General Comment points out that Article 27 does indeed confer a right on *individuals* belonging to minority groups, but it goes on to explain that the article has a group dimension, since the individual right depends in turn on the ability of the minority group to maintain its language, culture and religion. The Committee also explained that Article 27 may require positive measures of protection against the acts of the state party itself *and* against the acts of other persons within the state party. Later developments, such as the UN General Assembly’s *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* express a much broader notion of minority rights. According to Article 1 of the Declaration, “States *shall protect* the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall *encourage conditions for* the promotion of that identity” (emphasis added). According to the commentary associated with the Declaration, prepared for the UN Economic and Social Council’s Commission on Human Rights and published in 2005, the requirement to protect the existence of minority identities “is intended to ensure that integration does not become unwanted assimilation or undermine the group identity of persons living on the territory of the State”.¹¹⁶ Regional efforts have also been made to expand cultural rights. The OSCE’s *Document of the Copenhagen Meeting*, for example, states that “Persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will”. In order to achieve that aim, the Copenhagen Document obligates states to “create conditions for the promotion of that identity”.

Similar conclusions are drawn by the UN Committee on Economic, Social and Cultural Rights, which points out that cultural rights may be exercised by a person either as an individual, in

¹¹⁵ The negative and restrictive wording of Article 27 led Anghie, in an article published prior to the HRC’s General Comment on the matter, to conclude that “Article 27 only requires the State to desist from interfering with minorities wishing to practice their own culture. The State is not legally obliged to actively support minority cultures. Article 27 thus fails to provide more protection to minorities than was already extended by the regime of individual civil and political rights such as non-discrimination and the right to association.” Minorities, he argued, are therefore “confronted by a legal framework which sanctions, if not endorses, their assimilation or extinction.” Anthony Anghie, ‘Human Rights and Cultural Identity: New Hope for Ethnic Peace?’ 33 *Harvard International Law Journal* (1992) 341.

¹¹⁶ UN Economic and Social Council, *Commentary of the working group on minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (2005) UN Doc. E/CN.4/Sub.2/AC.5/2005/2, para. 21.

association with others, or within a community or group as such.¹¹⁷ The Committee points out that the right to take part in cultural life expressed in Article 15(1)(a) of the Convention on Economic, Social and Cultural Rights is interdependent on the right of self-determination and that it requires of the state both abstention and positive action. The right to participate in cultural life entails three levels of obligations on state parties, namely the obligations to respect, protect and fulfil. The obligation to respect requires States to “refrain from interfering, directly or indirectly, with the enjoyment of the right to take part in cultural life.” The obligation to protect requires states to “take steps to prevent third parties from interfering in the right to take part in cultural life.” The obligation to fulfil requires states to “take appropriate... measures aimed at the full realisation of the right”.¹¹⁸

The obligation to respect requires states, among other things, to adopt specific measures to prevent discrimination based on cultural identity and includes the right not to be assimilated into the dominant culture¹¹⁹. It also requires states to take positive measures to secure to cultural groups (and individual members thereof) the rights to freedom of expression in the languages of their choice. It also entails an obligation to adopt specific measures allowing such groups and individuals to “take part freely, in an active and informed way, and without discrimination, in any important decision making process that may have an impact on his or her way of life...”¹²⁰ The obligation to protect overlaps with the obligation to respect, in that it requires States to take measures to prevent third parties from interfering in the rights listed above along with some other rights. The obligation to fulfil can be subdivided into obligations to facilitate, promote and provide. A wide array of legal obligations is identified under this heading, such as the obligation to adopt policies “enabling persons belonging to diverse cultural communities to engage freely and without discrimination in their own cultural practices,” which overlap with self-determination and equality rights.

Other developments at the regional level, particularly by the OSCE, add to this oeuvre on cultural rights. For example, the OSCE’s *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* notes that one possible way of promoting the ethnic, cultural, linguistic and religious identities of national minorities involves

¹¹⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21*, UN Doc. E/C.12/GC/21

¹¹⁸ *Ibid*, para. 48.

¹¹⁹ *Ibid*, para. 49

¹²⁰ *Ibid* at para. 49(e)

establishing “appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the state concerned”. This is clearly a heavily circumscribed suggestion, but it is clear that autonomy arrangements of various different kinds are garnering attention at the international and regional level. It also demonstrates very clearly the links between the group right of self-determination and individual minority rights.

Minority rights are not, however, absolute. Paragraph 19 of the CESCR’s General Comment 21 points out that limitations on the right to participate in cultural life may be necessary in certain circumstances, “in particular in the case of negative practices including those attributed to customs and traditions that infringe upon other human rights”.¹²¹ These limitations are subject to the usual caveat that they must pursue a legitimate aim and be strictly necessary for the promotion of general welfare in a democratic society. In the case of *Lansman et al. v. Finland*¹²² the HRC clarified that Article 27 contains a kind of *de minimis* requirement: “measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under Article 27”. Measures that affect or interfere with culturally significant activities may be acceptable if the minority group has been consulted and “had the opportunity to participate in the decision-making process in relation to [the] measures”¹²³.

The overlaps between self-determination and cultural rights are therefore numerous. Both rights are concerned with widening opportunities for participation within the state and both are concerned with the conditions under which people can freely pursue their cultural development. That said, there are obvious distinctions between the two rights: minority rights are generally understood as individual rights with a strong group dimension, whereas self-determination is a group right belonging to “peoples”. Although one should be careful not to overlook the distinction, it is important to recognise how interrelated the two rights are. Self-determination is a group right concerned with facilitating the participation of all groups within the state; but as the Lund Recommendations point out, certain self-determination arrangements such as territorial autonomy can advance the individual minority rights of members of the

¹²¹ *Supra* n. 133

¹²² UN Human Rights Committee, *Jouni Lansman et al. v. Finland*, Communication No. 1023/2001, UN Doc. CCPR/C/83/D/1023/2001 (2005).

¹²³ UN Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 544/1993, UN Doc. CCPR/C/70/D/547/1993 (2000).

affected group or groups. In addition, the *Commentary of the Working Group on Minorities* associated with the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities – a document concerned with the individual rights of members of various minority groups, particularly those rights stemming from Article 27 ICCPR - explains:

“What is required is to ensure appropriate rights for members of all groups and to develop good governance in heterogeneous societies. By good governance is here understood legal, administrative and territorial arrangements which allow for peaceful and constructive group accommodation based on equality in dignity and rights for all and which allows for the necessary pluralism to enable the persons belonging to the different groups to preserve and develop their identity”.¹²⁴

The importance of the right of self-determination to the realisation of individual minority rights is therefore quite widely understood. Indeed, the Working Group on Minorities went so far as to argue that although cultural rights can only be claimed by individuals, the state cannot fully implement those rights without “ensuring adequate conditions for the existence and identity of the group as a whole.”¹²⁵ This will often require some form of self-governance or autonomy at the *group* level.

By the same token, measures taken in favour of individual members of minority groups (such as the right of individuals to access mother tongue education in state schools) can help to advance self-determination’s goal of increasing the participation of the group. Minority rights and peoples’ rights are separate categories, but they work in tandem to achieve the goals of securing and developing various group identities (whether ethnic, religious, linguistic, or some combination of these) and increasing the degree of participation of all of those various groups in the state’s political, social, cultural and economic life.

¹²⁴ UN Economic and Social Council, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, (2005) UN Doc. E/CN.4/Sub.2/AC.5/2005/2, para. 13

¹²⁵ *Ibid*, para. 14

Article 27 of the ICCPR is also linked with the right to non-discrimination outlined in the previous subsection.¹²⁶ The link can be articulated in several ways. First, the limited forms of equality that arise from judicial consideration (as outlined in the previous subsection) form “essential starting points” to facilitate Article 27.¹²⁷ In other words, states must take care to avoid indirectly or directly discriminating against members of minority groups. But the substantive protections derived from Article 27 go much further insofar as they enjoin states to take *positive action* on a *permanent* basis in order to facilitate the maintenance and development of minority identities. Second, it can be argued that the very purpose of Article 27 is to enable minority groups to do something that members of the cultural and linguistic majority take for granted—namely to maintain and develop their cultures and languages. Equality precepts might therefore be said to animate the *raison d’être* of Article 27.

4.6.3 *Other individual human rights*

Besides the broad categories of minority rights and equality, self-determination claims are also supported by more specific standards on, for example, linguistic rights, freedom of association, freedom of expression, political participation and so on. Again, although these are individual rights they can help to realise the goal of self-determination, namely the participation (understood broadly) of all groups within the state and they can assist in the goal of remedying the pathologies arising from how international law allocates sovereignty. Given the limited space available here, relevant individual rights will be woven into subsequent chapters, which will consider some core aspects of the Kurdish Question in Turkey.

4.7 *Conclusion*

The foregoing discussion has explained that the right of all peoples to self-determination has ongoing relevance beyond the decolonisation context. It has also been explained that the right primarily applies within the borders of existing states, but that it applies to the population of

¹²⁶ The linkage is recognised by, *inter alia*, the UN Human Rights Committee, *General Comment No. 29*, (2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para. 13(c).

¹²⁷ Gaetano Pentassuglia, *supra* n. 107, 97.

those territories understood in a *disaggregated* sense – that is to say, not only to the monolithic majority but to all groups and segments of society that together make up the whole people.

In its internal dimensions, self-determination contains three interlocking elements. In its participatory and legitimating element, it can legitimise claims for the reorientation of the relationship between the state and its minority communities in a manner that increases the ability of the minority group to participate in political, cultural, social and economic life. In its remedial element, the right provides additional normative support to claims which seek to remedy the pathologies arising from how international law allocates sovereignty around the globe. In its processual element, self-determination requires states to take legitimate minority claims seriously and to engage with them in good faith. This broad concept of self-determination is capable of providing normative support to a whole range of constitutional reforms aimed at redefining the state and disaggregating sovereignty, depending on the circumstances. For example, territorial autonomy might be justified as being consistent with the right of self-determination if it strikes a reasonable balance between the right of the affected minority group to more effectively participate, and the rights of other groups.

The right of self-determination overlaps with the rights to equality and the right of minorities. All three of these broad categories, along with more specific human rights standards, can be combined to justify particular self-determination arrangements and to criticise others. Broadly speaking, positive measures taken to increase the ability of a group and its members to participate effectively will not raise any objections on the grounds of non-discrimination if they are necessary to correct factual inequalities, proportionate to the aim pursued, and implemented only until the measures are no longer required. The right of minorities to maintain and develop their identities is animated by substantive equality concerns, but it goes further than the right to non-discrimination insofar as it requires states to take positive measures on a permanent basis to allow those identities to flourish. The “soft law” associated with minority rights is quite specific about the kinds of things that should be done in order to fulfil the right—such as education of or in the minority’s mother tongue. Measures taken at the individual level, such as an individual right to access mother tongue education in state schools, are not, properly speaking, self-determination measures (since self-determination is a right of peoples rather than individuals), but they nevertheless help to further the goal of self-determination. At the same time, group-based self-determination arrangements (such as minority control of their own schools) are desirable—perhaps necessary—in order to further the goal of minority rights. In

other words, minority claims often cut across several human rights categories and the technical legal distinction between individual rights and group rights should not blind one to that fact.

The next chapters will begin to consider some key aspects of the Kurdish Question in Turkey and how they fit into this human rights framework. The focus will be on mother tongue education and political participation both nationally and locally (in the form of territorial autonomy). Informed by Bell's concept of *hybrid self-determination*, the next section will consider in particular some of the ways in which Turkey's sovereignty might be disaggregated by analysing models from other countries.

PART III

**SELF-DETERMINATION AND ASPECTS OF
THE KURDISH QUESTION IN TURKEY**

CHAPTER FIVE

5 Kurdish Language Education

This chapter engages with one of the most important aspects of the Kurdish Question in Turkey, namely the demand to use the Kurdish language as the medium of education. It also explores various forms of autonomy that might best facilitate that claim and how the claim interfaces with international human rights law.

This chapter will first present a brief introduction to the Kurdish language. Then it will explain where mother tongue education (MTE) fits into the broader Kurdish Question in Turkey before setting-out a brief history of the Kurdish linguistic minority in Turkey and its current position under the ruling AKP government. The focus will then shift to legal analysis by arguing for the relevance of MTE (and language preservation more broadly) to the right of self-determination and to various individual rights. Having established that while there is no clear *right* to MTE there is at least strong *normative support* for it, the chapter considers two different self-determination models for realising MTE in Turkey. First, it considers the Canadian non-territorial autonomy model, then it considers the Basque territorial model before analysing the relevance of those models to contemporary Turkey.

5.1 *The Kurdish language: a brief introduction*

According to Skutnabb-Kangas, “Kurdish developed as an independent language in an area where Iranian languages have been spoken for at least 3,000 years, and has been documented since, at the latest, the time of the Arab conquest, i.e. for nearly 1,300 years”.¹ The Kurdish language is an Indo-European language which belongs to the northwestern Iranian family.² It is closely related to Farsi and more distantly to Turkish and Arabic.³ The Kurdish language, which is spread across several States including Iraq, Iran, Syria, and Turkey, contains a

¹ Tove Skutnabb-Kangas, ‘Killing a mother tongue – how the Kurds are deprived of linguistic human rights’ in Tove Skutnabb-Kangas & R. Phillipson (eds.), *Linguistic Human Rights: Overcoming Linguistic Discrimination* (Mouton de Gruyter 1994), 349.

² *Ibid.*

³ *Ibid.*

considerable number of dialects which are only very partially, if at all, mutually understandable.⁴ The Kurmanji dialect is dominant in Turkey and Syria, the Sorani dialect is dominant in Iraq, and the southeastern dialects (sometimes known as Kermashani) are dominant in parts of Iranian Kurdistan, including Kermanshah and Sanandaj. Some urban centers in Iraqi Kurdistan, such as Dahok, Zakho, Aqra and Amadiya speak a form of Kurmanji.⁵ Other dialects such as Zaza are present in Turkey, around Dersim and elsewhere, and speakers of the Gurani (also known as Hawrami) dialect are geographically dispersed, mainly around southeastern Kurdistan.⁶ According to van Bruinessen, “no strict boundaries exist. Dialects merge gradually; groups speaking one dialect may live among a majority of speakers of another. At many places, tribes speaking Zaza and Kurmanji share the same habitat”.⁷ The two main dialects, Kurmanji and Sorani, are divided by script. The Sorani dialect uses the Arabic script whereas Kurmanji uses the Latin script.

It is not possible to provide precise data on the number of Kurdish speakers in Turkey because Turkey does not collect data on topics such as mother tongue languages; furthermore, as will be explained below, the parlous situation of the Kurdish language in Turkey means that the number of people who can speak Kurdish and who use it in their day-to-day lives is constantly changing. Official data on mother languages was last collected in Turkey in 1927, but an unofficial survey carried out by KONDA in 2006 on the languages spoken in Turkey and the percentage of the population using them suggests that 84.54 per cent of the population speaks Turkish and 12.98 per cent speaks Kurdish with the remainder speaking Arabic, Armenian, Greek, Hebrew, Laz, Circassian, and the Coptic language.⁸ Roughly two-thirds of Turkey’s Kurds speak Kurmanji, but in some places, such as Diyarbakir, the language has been suppressed for so long that it has been “Turkified”.⁹ Anecdotally, a foreign visitor to Diyarbakir—informally the Kurdish capital—will notice that Turkish is spoken widely in public and in marketplaces while Kurdish, if it is spoken at all, is largely relegated to private

⁴ Martin van Bruinessen, *Agha, Shaikh and State: The Social and Political Structures of Kurdistan* (Zed Books 1992), 21

⁵ Amir Hassanpour, ‘The Indivisibility of the Nation and its Linguistic Divisions’ 217 *International Journal of the Sociology of Language* (2012) 49, 57.

⁶ Martin van Bruinessen, *supra* n. 4, 22.

⁷ *Ibid.*

⁸ Handan Çağlayan, *Same Home, Different Languages: Intergenerational Language Shift: Tendencies, Limitations Opportunities: The Case of Diyarbakir* (DISA Publications 2014), 49.

⁹ International Crisis Group, *Turkey’s Kurdish Impasse: The View from Diyarbakir* (2012) <<https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-kurdish-impasse-view-diyarbakir>> accessed 12/04/2017, 10.

home use. The Kurdish language is concentrated in South-eastern Turkey (the Kurdistan region) but due in large part to the oppressive policies of the Turkish state there are many Kurdish speakers dispersed elsewhere in Turkey, particularly in Istanbul.¹⁰ Thus, the Kurdish language has been spoken in Turkey for more than 1,000 years, and it is both territorially concentrated and dispersed. Scholars have estimated that the Kurdish language as a whole (i.e. including speakers outside Turkey) ranks fortieth out of the world's 6,600 to 7,000 languages in terms of the number of speakers.¹¹

5.2 *Mother tongue education and the Kurdish Question*

A review of some of the available literature reveals a widespread consensus around the fact that linguistic rights—particularly the claim to use Kurdish in education—are a central, indeed perhaps *the* central, aspect of the Kurdish Question. According to the 2008 *Roadmap for a Solution to the Kurdish Question*, produced by the Turkish Economic and Social Studies Foundation (TESEV) after extensive consultations with various experts, politicians, non-governmental representatives, and opinion leaders that are believed to represent Kurdish society¹² Turkey needs to enact a new constitution that “[entitles] Kurds to public services and to education in and of languages other than the official one in the areas where they predominantly reside”.¹³ The Diyarbakir Institute for Political and Social Research (DIPSA) adds that the use of the Kurdish language as the medium of educational instruction is a core aspect of the Kurdish Question:

“Different Kurdish political circles have developed very different perspectives for the solution of the Kurdish issue. But the certitude that Kurdish must be used in education is a point on which all Kurdish movements agree. In fact, the use of Kurdish in

¹⁰ According to the International Crisis Group, “as many Kurds live in Western Turkey, particularly in Istanbul, as in the south east...” (though it is not possible to state how many of those dispersed Kurds can speak Kurdish). International Crisis Group, *ibid*, i.

¹¹ Amir Hassanpour, Jaffer Sheyholislami & Tove Skutnabb-Kangas, ‘Kurdish: Linguicide, resistance and hope’ 217 *International Journal of the Sociology of Language* (2012) 1, 2.

¹² TESEV, *A Roadmap for a Solution to the Kurdish Question: Policy Proposals from the Region for the Government* (2008) <http://teseiv.org.tr/wp-content/uploads/2015/11/A_Roadmap_For_A_Solution_To_The_Kurdish_Question_Policy_Proposals_From_The_Region_For_The_Government.pdf> accessed 12/04/2017, 5.

¹³ *Ibid*, 6.

education is a point on which not only all Kurdish political and non-governmental groups agree, but also one that those who seek democratic methods for the resolution of the conflict also agree on. Findings by academics working in the fields of pedagogy, linguistics, sociology, political science and developmental psychology strongly point to the necessity of this outcome”.¹⁴

According to *International Crisis Group*, “Kurdish activists of all political affiliations focus on the right to mother tongue education, but out of a fear of marginalization and to protect their linguistic heritage, rather than a wish for dominance”.¹⁵ The language issue was one of three main topics for consideration during Turkey’s 2009 “Democratic Opening”, alongside criminal justice, amnesty, and political participation.¹⁶ The outline of the basic deal that was under negotiation is still considered the most reasonable long-term goal; indeed, having conducted some research pursuant to the Democratic Opening, Turkey’s former Interior Minister became convinced that language is the *most important* key to solving the Kurdish Question: “One of the first people I talked to was [famed Kurdish writer] Yasar Kemal. He said, ‘it’s 90 per cent language. If you solve that it’s mostly done’”.¹⁷ This might be an over-exaggeration, given the importance of economic development and achieving some kind of political self-governance, but it is certainly true that measures to maintain and develop the Kurdish language are of central importance. Indeed, an eight-day tour of southeast Turkey conducted by the USA in 2009 revealed that, broadly speaking, Kurds have four main concerns: changes to the Turkish constitution, use of the Kurdish language, amnesty for PKK members, and an end to military operations in the southeast.¹⁸ Academics and scholars also emphasise the importance of linguistic rights for the resolution of the Kurdish Question. For example, Günes points out that although the precise nature of a future settlement in Turkey requires dialogue and negotiation, any possible solution must take into account at least three things: Kurdish demands for self-rule (covered in Chapter Seven), constitutional recognition of their identity, and “cultural and

¹⁴ DIPSA, *Scar of the Tongue: Consequences of the Ban on the Use of Mother Tongue in Education and Experiences of Kurdish Students in Turkey* (2011) <http://dealingwiththepast.org/wp-content/uploads/2015/03/Disa-Scar_of_Tongue.pdf> accessed 12/04/2017, 10.

¹⁵ International Crisis Group, *Turkey: Ending the PKK Insurgency* (2011), <<https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-ending-pkk-insurgency>> accessed 12/04/2017, 12.

¹⁶ *Ibid*, 8.

¹⁷ *Ibid*, 11.

¹⁸ DIPSA, *Scar of the Tongue: Consequences of the Ban on the Use of Mother Tongue in Education and Experiences of Kurdish Students in Turkey* (2011) <http://dealingwiththepast.org/wp-content/uploads/2015/03/Disa-Scar_of_Tongue.pdf> accessed 12/04/2017.

language rights, such as education and broadcasting in Kurdish”.¹⁹ Waldman and Caliskan point out that Kurdish mother tongue education is first and foremost on the Kurdish list of demands.²⁰

The necessity of securing Kurdish linguistic rights is also expressed by some powerful and influential Kurdish political parties and organisations. For example, the Kurdistan Democratic Communities Union (KCK)—a kind of umbrella organisation for various Kurdish groups across Kurdistan, including the PKK and the Syrian PYD—points out that “There are fundamental conditions for the resolution of the Kurdish question. Without meeting these fundamental demands talking of details is meaningless”.²¹ In that connection, the KCK lists three fundamental demands, one of which is “The acceptance of mother tongue education at every level on account of [Kurds] being a people subjected to cultural genocide”.²² The Democratic Society Congress (DTK)—another umbrella organisation with a focus on Turkey—lists 14 points in its *Declaration of Political Resolution Regarding Self-Rule*. Point number 7 demands “Provision of education in all mother tongues besides Turkish”.²³ The imprisoned leader of both the PKK and the KCK, Abdullah Öcalan, states that it is necessary to create a democratic nation that “is not based on any single language, ethnicity, class or state but is multilingual, multi-ethnic and does not leave room for class distinction or state privileges”.²⁴ In that regard, he notes the following:

“If the obstacles to the use of the Kurdish language and culture [are removed] ... integration of the Kurdish people with the state will occur. Negative perceptions and distrust of the state will change to positive perceptions and trust. The basis for rebellion and confrontation will be finished”.²⁵

¹⁹ Cengiz Günes, ‘Accommodating Kurdish National Demands in Turkey’ in Ephraim Nimni, *The Challenge of Non-Territorial Autonomy: Theory and Practice* (Peter Lang 2013), 80.

²⁰ Simon Waldman & Emre Caliskan, *The New Turkey and its Discontents* (Hurst 2016), 185.

²¹ Kurdish Info, *Democratic Resolution Declaration from KCK*, <<http://www.kurdishinfo.com/democratic-resolution-declaration-kck>> accessed 20/04/2017.

²² *Ibid.*

²³ ANF News, *Declaration of political resolution regarding self-rule*, <<https://anfenglish.com/kurdistan/declaration-of-political-resolution-regarding-self-rule-13498>> accessed 20/04/2017.

²⁴ Abdullah Öcalan, *The Road Map to Democratisation of Turkey and Solution to the Kurdish Question*, <<http://www.pkkonline.com/en/index.php?sys=article&artID=123>> accessed 20/04/2017.

²⁵ Abdullah Öcalan, cited in Michael Gunter, *The Kurds Ascending: The Evolving Solution to the Kurdish Problem in Iraq and Turkey* (Palgrave, 2008) at p. 71

A survey conducted in 2012 in the mainly Kurdish southeast of Turkey indicates that a majority of citizens want some form of mother-tongue education: 35 per cent wanted education in their mother tongue, with other languages as elective courses; 21 per cent favoured bilingual education in both Turkish and Kurdish; 42.5 per cent wanted Turkish to remain the current language of education, with one third of this group saying that Kurdish should be an elective.²⁶

Various treaty monitoring bodies and regional institutions have also suggested that Turkey should grant linguistic rights to its Kurdish population. For example, the Council of Europe's European Commission against Racism and Intolerance notes in its 2016 report on Turkey that Turkey should consider authorising mother tongue teaching for children from all minority groups.²⁷ The UN Committee on the Elimination of Racial Discrimination recommended in its 2016 concluding observations on Turkey that it should "improve the access of Kurdish children in schools, including by promoting the teaching in their mother tongue".²⁸ And in its 2012 concluding observations on Turkey, the UN Committee on the Rights of the Child recommended that Turkey "Consider means of providing education in languages other than Turkish, particularly in primary schools in areas where other languages, in addition to Turkish, are widely spoken".²⁹

5.3 *A brief history of the Kurdish linguistic minority in Turkey*

The Ottoman Empire did not have an official language policy or a standardised educational system.³⁰ At the height of its power, education in the Ottoman Empire was fragmented among Palace Schools, religious *mekteb* and *medrese*, and schools run by the various millets. The Palace Schools were primarily secular schools responsible for educating the next generation of Ottoman leaders.³¹ The provision of education to the rest of the population was the responsibility of various religious agencies, private initiatives, and millets. For the bulk of the

²⁶ International Crisis Group, *supra* n. 15, 12.

²⁷ European Commission Against Racism and Intolerance, *Report on Turkey* CRI(2016)37, 32.

²⁸ UN CERD, *Concluding observations on the combined fourth to sixth periodic reports of Turkey* (2016), UN Doc. CERD/C/TUR/CO/4-6, para. 30.

²⁹ UN Committee on the Rights of the Child, *Concluding observations: Turkey* (2012), UN Doc. CRC/C/TUR/CO/2-3, para. 59(g).

³⁰ Aysegül Aydingün & Ismail Aydingün, 'The Role of Language in the Formation of Turkish National Identity and Turkishness' 10 *Nationalism and Ethnic Politics* (2004) 415, 417.

³¹ Andreas M. Kazamias, *Education and the Quest for Modernity in Turkey* (Allen & Unwin 1966), 27.

Muslim population, education was provided in the *mekteb* where instruction was essentially limited to teaching and reciting the Koran. These schools were often attached to mosques and “constituted one of the most important avenues through which the values of Ottoman Islamic society were transmitted to the young”.³² For the non-Muslim communities, education was provided by the various millets. The Greek communities around Constantinople, for example, set up schools “aimed at inculcating Greek Orthodox religious beliefs and teaching the Greek language and culture”.³³ Kazamias notes that no Turkish was taught in Greek schools until 1895, when the Ottoman government made it a compulsory subject.³⁴ In the later years of the Ottoman Empire, these schools became hotbeds of Greek nationalism. Although efforts were made during the *tanzimat* period to create a more unified and State-led educational system and to “edge the obscurantist clerics out of positions of power”³⁵ the success of those reforms was quite limited.

Thus one of Atatürk’s primary intellectual influences, Ziya Gökalp, opined that Ottoman society contained “three layers of people differing from each other by civilization and education”. The common people were living in the ancient age, the men educated in *medreses* were living in the medieval age, and the men educated in the modern secular schools were living in the modern age. How, he asked, “can we be a real nation without unifying this threefold education?”³⁶ This, indeed, was the central question. Having been torn apart by rival nationalisms and external interference, what would it take to unify the new Turkish Republic and allow it to compete with, and defend itself against, external powers? The answer, for Atatürk and his associates, was already nascent in the ideas of the Young Turks and thinkers like Ziya Gökalp, namely *to transform Turkey into a European style nation-state unified around the Turkish language and Turkish culture*. A new system of education was seen as absolutely crucial for achieving this goal. As Atatürk’s Prime Minister İsmet İnönü explained:

³² *Ibid*, 32.

³³ *Ibid*, 32.

³⁴ *Ibid*, 95.

³⁵ Sükrü Hanioglu, *Atatürk: An Intellectual Biography*, (Princeton University Press 2011), 13.

³⁶ Andreas M. Kazamias, *supra* n. 31, 109.

“Foreign cultures need to melt into this monolithic nation... if we are to live, we shall live as a monolithic nation. That is the general aim for the system we call national education”.³⁷

Forging this “monolithic nation” was seen to require a single language shared by all citizens. This would allow the elite strata of society to spread nationalist propaganda among the masses and strengthen national identity.³⁸ Gökalp highlighted the close links between the State’s language policy, its official nationalism, and its educational system when he wrote that a nation was:

“not a racial or ethnic or geographical or political or volitional entity, but is composed of individuals who share a common language, religion, morality, and aesthetics; that is to say, of those who have received the same education”.³⁹

Based on this observation, Gökalp reached some important conclusions about the type of education required. First, “since education inculcates culture and culture is national, education must be national”.⁴⁰ Second, education must be “according to Turkish culture”.⁴¹ Third, education must aim to develop “idealists” and “national types”.⁴² Finally, special attention must be paid to the education of “patriotic men” who will be “the guiding elite of the nation”.⁴³ Education was to be the vehicle for constructing a new nation-state, built around Turkishness and the Turkish language, upon the ruins of the multiethnic and multilingual Ottoman Empire. Just as the religious schools in the Ottoman Empire had sought to transmit Islamic values to the young at a time when Islam was the ideological justification of the Sultan’s power, the secular schools under the Turkish Republic would seek to transmit nationalistic values and the Turkish language to the young at a time when the monolithic nation was the ideological justification of state power. For that reason, education was also to become a site of cultural and linguistic assimilation. As destructive as this has been—and continues to be—one must

³⁷ Ugur Ümit Üngör, *The Making of Modern Turkey: Nation and State in Eastern Anatolia, 1913-1950* (OUP 2011), 176.

³⁸ Aysegül Aydingün & Ismail Aydingün, *supra* n. 30.

³⁹ *Ibid.*, 423.

⁴⁰ Andreas M. Kazamias, *supra* n. 31, 111.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

acknowledge that Turkey's pursuit of a nation-state has not been *uniquely* destructive of minority cultures and languages. Indeed, the construction of nation-states often goes hand-in-hand with assimilation. Lipson reminds us that the countries that are today associated with relative linguistic homogeneity were often made more uniform through state power and unified educational systems⁴⁴ and Chapter One of this thesis pointed out that it is the historical lack of a Kurdish nation-state that has allowed multiple Kurdish dialects to flourish.

Although Atatürk himself promised to grant “all manner of rights and privileges”⁴⁵ to the Kurds, including autonomy in the framework of local government⁴⁶ in return for their adhesion to the Turkish state and support in the War of Independence, he quickly backtracked because his priority was “to create a modern, secular Turkey,” and “He needed absolute power to do it”.⁴⁷ Thus in one of his speeches, Atatürk noted the importance of the Turkish language to the formation of a Turkish nation-state:

“One of the most obvious characteristics of a nation is language. A person who says that he belongs to the Turkish nation, should, primarily and absolutely, speak Turkish”.⁴⁸

Like Gökalp, Atatürk “believed that cultural homogenization could only be realised through education,” and that language was “the core element in the creation of Turkishness and a culturally homogeneous, modern and secular society”.⁴⁹ This was to be achieved against the backdrop of a population that was more than 90 per cent illiterate⁵⁰ and where, according to the 1927 population census, Turkish was not the native language of 2 million out of 13.6 million citizens.

On 3rd March 1924, the *Official Gazette* published the Law of Unification of Instruction, which provided that “all educational institutions are to be placed under the control of the Ministry of

⁴⁴ Leslie Lipson, *The Democratic Civilization* (OUP 1964), 121.

⁴⁵ Andrew Mango, ‘Atatürk and the Kurds’ 35 *Middle Eastern Studies* (1999) 1, 6-7.

⁴⁶ *Ibid*, 15.

⁴⁷ *Ibid*, 18-19.

⁴⁸ Aysegül Aydingün & Ismail Aydingün, *supra* n. 30, 423.

⁴⁹ *Ibid*, 426.

⁵⁰ Andreas M. Kazamias, *supra* n. 31, 116.

Education”.⁵¹ The use of Turkish was insisted upon in law courts, and the official use of Kurdish was prohibited, including its use in schools.⁵² Another law passed on 22nd April 1924 placed military schools under the control of the Ministry of Defence. The 1924 Constitution of the Republic of Turkey provided that Turkish was the official language (Article 2), that education was to be supervised and controlled by the State (Article 80), and that primary education was obligatory for all Turks and free in government schools (Article 87). The closure of the religious schools effectively ended mother-tongue education for non-Turkish speaking Muslim citizens⁵³ and the language policies that followed in the Kurdish regions of Turkey have been described as being “in the realm of the colonial⁵⁴” as Kurds were portrayed as uncivilized tribes who had to be civilized and brought into the fold of the Turkish nation. This colonial rhetoric, which “emphasized the nonhuman nature of the Kurds, routinely turning to images of ‘savages’ and ‘barbarians,’” created the right climate for the oppressive treatment of Kurds in the South-east.⁵⁵

Turkey’s oppressive language policies intensified after the Sheikh Said rebellion in 1925⁵⁶ particularly during the 1930s. Turkish place names began to replace Kurdish ones⁵⁷, and Kurdish language publications were banned via cabinet decisions which labelled them as separatist under the 1931 Press Law.⁵⁸ Furthermore, the 1934 Race Name Law made the adoption of Turkish surnames compulsory with the aim, according to the then Minister of Internal Affairs, of “[erasing] difference, which does not exist in reality except in chimera”.⁵⁹ According to Van Bruinessen, the Race Name Law “turned numerous Kurdish families into Turks, Özturks, Tatars or Ozbeks”.⁶⁰

⁵¹ *Ibid*, 118.

⁵² David McDowall, *A Modern History of the Kurds* (3rd ed.) (I.B. Tauris 2004), 191-192.

⁵³ Martin Van Bruinessen, *Race, culture, nation and identity politics in Turkey: some comments*, paper presented at the Mica Ertegun Annual Turkish Studies Workshop on Continuity and Change (1997) <http://www.hum.uu.nl/medewerkers/m.vanbruinessen/publications/Identity_politics_in_Turkey.pdf> accessed 17/07/17.

⁵⁴ Ugur Ümit Üngör, *supra* n. 37, 213. Indeed, a report prepared by the Interior Minister after the Sheikh Said rebellion proposed ruling Kurdish provinces “in a colonial way.” See Welat Zeydanlioglu, ‘Turkey’s Kurdish Language Policy’, 217 *International Journal of the Sociology of Language* (2012) 99, 106.

⁵⁵ *Ibid*, 304.

⁵⁶ Martin Van Bruinessen, *supra* n. 4, 298.

⁵⁷ This policy became official in 1940 but many place names had already been changed via administrative decisions. See Derya Bayir, *Minorities and Nationalism in Turkish Law* (Ashgate 2013), 106.

⁵⁸ Derya Bayir, *Ibid*, 102.

⁵⁹ *Ibid* at p. 105

⁶⁰ Martin Van Bruinessen, *supra* n. 4, 6.

Since Turkey did not opt for a *de jure* ban on non-Turkish languages until the 1980s⁶¹ responsibility for enforcing the prohibition on non-Turkish languages shifted to local governments, which enforced fines against those who did not speak Turkish.⁶² Kurdish citizens were fined according to a tariff for each Kurdish word spoken.⁶³ Responsibility also shifted to civil society groups, including nationalistic students who initiated the “Citizen, Speak Turkish!” campaign. Permission for this campaign was granted by the Ministry of Interior and funding was granted by the Ministry of Education.⁶⁴ The aim of the campaign, which focused mainly on non-Muslim minorities, was to warn, and sometimes to intimidate, non-Turkish speaking citizens to speak Turkish in public.⁶⁵ In certain areas it became almost impossible to speak a non-Turkish language in public due to the risk of verbal harassment and physical attack.⁶⁶

What Ungor calls the “main pillar”⁶⁷ of Turkey’s language policy was the new education system under the strong central control of the State. Kurdish girls, in particular, were seen as “carriers of national reproductivity, vessels of national identity, and transmitters of culture”.⁶⁸ Many were taken from their families and placed in boarding schools – the first of which was established in 1937.⁶⁹ These schools gave clear priority to Turkish language classes and were “the institutional manifestation of the government’s determination to restructure completely the Kurds’ minds and personalities”.⁷⁰ Kurdish names, seen as symbols of Kurdish identity, were forcibly changed upon arrival and there was an absolute prohibition on speaking Kurdish.⁷¹ Ungor notes that “for Kemalist philanthropists the journey of Kurdish children to the boarding school was that first step out of the darkness of “savagery” into the light of “civilization”.⁷² The use of boarding schools to “civilize” minority and indigenous groups was by no means a unique phenomenon, nor a peculiarly Turkish one. In Canada (as in North

⁶¹ *Ibid*, 101.

⁶² *Ibid*, 102.

⁶³ Desmond Fernandes, ‘Modernity and the linguistic genocide of Kurds in Turkey’ 21 *International Journal of the Sociology of Language* (2012) 75, 90.

⁶⁴ Senem Aslan, “‘Citizen, Speak Turkish!’: A Nation in the Making’ 13 *Nationalism and Ethnic Politics* (2007) 245, 251.

⁶⁵ *Ibid*, 254.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*, 306.

⁶⁸ *Ibid*, 330.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*, 334.

⁷¹ *Ibid*

⁷² Ugur Ümit Üngör, *supra* n. 37, 333.

America as a whole), for example, indigenous children were forced to attend residential schools where they were immersed in Euro-Canadian culture and forced to speak English on pain of severe beatings.⁷³ The aim was to culturally and economically assimilate these communities into the colonisers' way of life.⁷⁴ Similarly in Australia, Aboriginal children were forcibly separated from their families and "civilized" into the Christian way of life—a practice intended to "save them from being primitive savages of little value..."⁷⁵

According to McDowall, the post-coup 1961 constitution somewhat improved the situation of the Kurds and even allowed them to express their dissent in Kurdish.⁷⁶ Zeydanlioglu notes that the Kurdish question "re-emerged" in this more tolerant climate and the official line was more open to challenge, although many writers and publishers were imprisoned for crimes such as spreading "separatist propaganda".⁷⁷ Despite these small improvements, the general policy of Turkification continued as, for example, 28,000 non-Turkish place names had been changed for Turkish names by 1978⁷⁸, a move that was sanctioned by Law No. 1587 (1960). Furthermore, a special report prepared in 1961 by the State Planning Organisation under the supervision of the National Security Council contained three core policy recommendations aimed at ending "separatist activities" that threatened the unitary structure of the country. One of the recommendations involved "building more schools in the [Kurdistan] region in order to train 'missionaries' to spread the Turkish language and culture".⁷⁹ By the end of the 1960s, sixty out of seventy boarding schools in Turkey were located in the Kurdistan region.⁸⁰

The coup of 1980 and the subsequent constitution of 1982 took the suppression of the Kurdish language to a new level. Article 3 of the constitution establishes Turkish as the language of the state, rather than just the official language, and unlike previous constitutions it makes this provision legally unamendable. Article 42 provides that "No language other than Turkish shall

⁷³ Donna Feir, 'The long-term effects of forcible assimilation policy: The case of Indian boarding schools', 49(2) *Canadian Journal of Economics* (2016) 433.

⁷⁴ *Ibid*, p. 435.

⁷⁵ David Mander, Lynne Cohen & Julie Ann Pooley, "'If I Wanted to Have More Opportunities and Go to a Better School, I Had to Get Used to It': Aboriginal Students' Perceptions of Going to Boarding School in Western Australia', 44(1) *The Australian Journal of Indigenous Education* (2015) 26, p. 27.

⁷⁶ David McDowall, *The Kurds: A Nation Denied* (Minority Rights Group 1992), 39.

⁷⁷ Welat Zeydanlioglu, *supra* n. 54, 108-9.

⁷⁸ Derya Bayir, *supra* n. 57, 107.

⁷⁹ Veli Yadirgi, *The Political Economy of the Kurds of Turkey: From the Ottoman Empire to the Turkish Republic* (CUP 2017), 202.

⁸⁰ Ismael Besikçi, cited in Veli Yadirgi, *ibid*, 203.

be taught as a mother tongue to citizens at any institution of education,” while reserving the provisions of international treaties (such as the Treaty of Lausanne, which grants non-Muslim minorities the right to education in their mother tongues). Article 28(2), which was subsequently amended in 2001, provided that “no publications or broadcasts may be made in any language prohibited by law”. This latter article provided a constitutional basis for Law 2932 of 1983, which decreed that “the mother tongue of all Turkish citizens is Turkish” and, contradictorily, forbade the use of any language except Turkish “as a mother tongue”.⁸¹ Article 2 of the same law banned the Kurdish language without acknowledging that the Kurdish language existed⁸²:

“It is forbidden to express, disseminate, and publish thoughts in any language other than the first official languages of the States recognised by the Turkish State”.⁸³

This law, according to the DIPSA report, “banned all possible activities that could be held in Kurdish and even the production of records, cassettes and other audio-visual materials in this language” with the aim of “protecting the indivisible unity of the state with its territory and nation, national independence, the Republic, national security and public order”.⁸⁴ The report goes on to note that the coup leaders took the ban on Kurdish so seriously that “When family members who did not speak Turkish spoke with their children in Kurdish they would be beaten and asked either to keep silent or to communicate via signs”.⁸⁵ Legal action was taken against people speaking Kurdish at work⁸⁶, and traditional Kurdish folk dances were not allowed to be accompanied by songs in the Kurdish language.⁸⁷ At the same time, several articles of the Turkish Penal Code were used to punish Kurds for the expression of non-violent opinions. For

⁸¹ Human Rights Watch, *Violations of Free Expression in Turkey* (1999) at ch. IX, <<https://www.hrw.org/reports/1999/turkey/index.htm#TopOfPage>> accessed 18/07/17.

⁸² This was not accidental. It was part of a policy of denial – in existence before the coup of 1980 - whereby Kurds were labelled “Mountain Turks” who spoke a mongrelised form of Turkish. Academics who acknowledged the existence of a separate Kurdish nation, such as Ismael Besikci, spent more than a decade in prison on trumped-up charges. See Michael Gunter, ‘The Kurdish Problem in Turkey’ (1988) *Middle East Journal* 389 at p. 400

⁸³ Ergun Ozbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave 2011), 51.

⁸⁴ DIPSA, *supra* n. 14, 36.

⁸⁵ *Ibid.*

⁸⁶ Helsinki Watch, *Destroying Ethnic Identity: The Kurds of Turkey* (Helsinki Watch 1990), 60.

⁸⁷ *Ibid* at p. 66

example, Article 142(3) of the Code prohibited the dissemination of “separatist propaganda,” and Article 143 prohibited “the weakening of national feelings”.⁸⁸

The draconian Law 2932 was repealed in 1991 under Article 23(e) of Law 3713, known as the Anti-Terror Law. But Article 1 of the Anti-Terror Law contained an exceptionally broad definition of terrorism and, under Article 8, it criminalised “Written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with its territory and nation...” Until 1995, this “propaganda” could be punished with prison sentences and fines “regardless of the methods, intentions and ideas behind such activities”.⁸⁹ In effect, the 1991 Anti-Terror Law “recapitulate[d] most of the prohibitions on the use of Kurdish in the earlier, annulled laws, but often in a more covert form”.⁹⁰ It marked a shift from the state’s “denial politics”⁹¹ in relation to Kurdish identity—a position that was no longer tenable due, in part, to the rise of the PKK—to the *securitisation* of the Kurdish question. Along with other legal provisions such as then Article 312 of the Penal Code (which made it an offence to promote differences among people based on class, race or religion) and then Article 168 of the Penal Code (on membership of a terrorist organisation) the Anti-Terror Law was used to prosecute Kurds for using the Kurdish language and expressing their Kurdish identity.

During the 1990s, the Turkish State’s atrocities against the Kurdish population peaked as the war on the PKK escalated.⁹² At first, the number of prosecutions under the Anti-Terror Law was quite low and often resulted in acquittal⁹³ but the number of cases sharply increased as part

⁸⁸ Tove Skutnabb-Kangas, *supra* n. 1, 356. Bayir’s account differs slightly in that Article 142(3) is said to outlaw “racism propaganda” rather than “separatist propaganda”. See Derya Bayir, *The role of the judicial system in the politicized of the Kurdish opposition* in Cengiz Gunes and Welat Zeydanlioglu, *The Kurdish Question in Turkey: New Perspectives on Violence, Representation and Reconciliation* (Routledge 2013), 27.

⁸⁹ An English language version of the unamended 1991 anti-terror law is available at: <http://www.opbw.org/nat_imp/leg_reg/turkey/anti-terror.pdf> accessed 19/07/17. The law was amended in 1995 to require proof of intent to destroy the unity of the State, *see* Human Rights Watch, *Domestic Legal Framework* <<https://www.hrw.org/reports/1997/turkey/Turkey-09.htm>> accessed 20/07/17.

⁹⁰ Tove Skutnabb-Kangas, *supra* n. 1, 355.

⁹¹ Veli Yadirgi, *supra* n. 79, 222.

⁹² For background information see Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* (NYU Press 2009). Human Rights Watch noted that by the mid-1990s “more than 3,000 villages had been virtually wiped from the map” and “378,335 Kurdish villagers had been displaced and left homeless”. Human Rights Watch, “Still Critical”: Prospects in 2005 for Internally Displaced Kurds in Turkey <<https://www.hrw.org/reports/2005/turkey0305/index.htm>> accessed 22/07/17.

⁹³ Amnesty International, *Turkey: Dissident Voices Jailed Again* (1994) <<https://www.amnesty.org/download/Documents/180000/eur440451994en.pdf>> accessed 20/07/17.

of the State's "total war" on separatism.⁹⁴ Although the main target of prosecutions during this period was *Kurdism* rather than the use of the Kurdish language *per se* the two categories frequently overlapped. For example, the weekly newspaper *Azadi* (Freedom) was founded in May 1992, after the repeal of Law 2932. It was published in both Kurdish and Turkish. In a 1994 report, Amnesty International noted that the newspaper had been "subjected to a hail of litigation since its foundation" and that "sixty-six out of 104 issues have been confiscated, resulting in 66 prosecutions for which the State prosecutor has demanded 20 years' imprisonment for various people connected with the publication".⁹⁵ Perhaps the most well-known example is the case of Leyla Zana, then a member of parliament for the Democracy Party. During her inauguration as a member of parliament in 1991, she wore traditional Kurdish colours in her headband and uttered two short sentences in the Kurdish language after taking her oath in Turkish.⁹⁶ This mild behaviour "provoked pandemonium in the parliamentary chamber"⁹⁷ and led to Zana's imprisonment on the unproven charge of being a member of an illegal armed organisation.⁹⁸ One of the problems with trying to draw a bright dividing line between *Kurdism* and the use of the Kurdish language and expressions of Kurdish identity was that years of oppression had resulted in all kinds of everyday activities being politicised. Writing in 1997, Pierse noted that "The most popular theme of Kurdish music is the Kurdish struggle against oppression; wearing traditional Kurdish clothes is an expression of Kurdish cultural identity but is also a political statement. Even dancing has become more and more a political statement".⁹⁹

Although there was some very limited Kurdish language broadcasting during this period, the content of those broadcasts was heavily restricted by the state. Pierse noted that a Kurdish station was permitted to broadcast Kurdish music, but only from a list of songs approved by

⁹⁴ *Ibid.* Amnesty International wrote of those who had been imprisoned: "Their cases are subject to the draconian provisions of the Anti-Terror Law even though they have employed no weapon more offensive than a pen."

⁹⁵ *Ibid.*, 2.

⁹⁶ Zana promised, in Kurdish, to "struggle so that the Kurdish and Turkish peoples may live peacefully together in a democratic framework." Amnesty International, *The colours of their clothes: parliamentary deputies serve 15 years' imprisonment for expressions of Kurdish political identity* (1997), <<https://www.amnesty.org/download/Documents/160000/eur440851997en.pdf>> accessed 20/07/17.

⁹⁷ *Ibid.*, 2.

⁹⁸ Zana was later re-tried and her original sentence upheld, but significant defects were identified in the trial procedure. Stuart Kerr, 'The Re-Trial of Leyla Zana and Other Kurdish Former Parliamentarians' 5 *KHRP Legal Review* (2004) 55.

⁹⁹ Catherine Pierse, 'Violation of Cultural Rights of Kurds in Turkey' (1997) *Netherlands Quarterly of Human Rights* 325, 332.

security officials.¹⁰⁰ By 1997, Pierse noted that only one weekly newspaper (*Welat Me*) was publishing in Kurdish, although several others were publishing in both Kurdish and Turkish.¹⁰¹ To use the Kurdish language or express one's Kurdish identity in public was to risk prosecution and imprisonment—a considerable risk given the rampant torture and abuse in Turkish prisons. Noam Chomsky gives a broad impression of the conditions during the 1990s in an anecdote about his participation in a public meeting in Diyarbakir:

“The courage of the people is beyond my ability to describe. From the children in the streets wearing Kurdish colours – a serious offence, for which punishment of the families could be severe – to the members of a large and enthusiastic public meeting I attended in Diyarbakir. At the end, several students came forward and in front of TV and police cameras, presented me with a Kurdish-English dictionary. That was an act of considerable bravery, and a precious gift; right at that time students and their parents were being interrogated, reportedly tortured, and facing imprisonment for submitting legal petitions requesting the right to have elective courses in their native language”.¹⁰²

5.4 *Kurdish language rights under the ruling AKP*

Racep Tayyip Erdogan's AKP came to power in 2002 on a centre-right platform. An important part of its program for government was to pursue European Union (EU) accession—a decision that served the threefold aim of solving the AKP's crisis of legitimacy (given the powerful influence of secular institutions such as the army and the judiciary over politics, and their hostility to the AKP's Islamist background), winning the support of the Islamist bourgeoisie, and creating propitious conditions for a reduction of the military's influence in politics.¹⁰³ Turkey had already entered a full association agreement with the EEC in 1963 and formally applied for full accession to the EC on 14 April 1987.¹⁰⁴ A major leap forward was achieved on 6 March 1995 when the Turkey-EU customs union was agreed. Turkey progressed to EU

¹⁰⁰ *Ibid*, 335.

¹⁰¹ *Ibid*, 333.

¹⁰² Noam Chomsky, *The People in Gravest Danger* (2007) <<https://newhumanist.org.uk/articles/580/the-people-in-gravest-danger->> accessed 20/07/17.

¹⁰³ Simon Waldman & Emre Caliskan, *The New Turkey and its Discontents* (Hurst 2016), ch. 2.

¹⁰⁴ Kerim Yildiz, *The Kurds in Turkey: EU Accession and Human Rights* (Pluto Press 2005), 21.

candidature in 1999¹⁰⁵ and on 6 October 2004, the European Commission concluded that Turkey had sufficiently met the necessary criteria to open accession negotiations—a conclusion that was substantially endorsed by the European Council on 17 December 2004.¹⁰⁶

This was important because the Copenhagen criteria for EU accession include certain minority rights guarantees and EU organs made it clear from the outset that “The situation of the Kurdish and other minorities in particular will have to be addressed comprehensively”.¹⁰⁷ But it should not be assumed that the EU accession process was the *only* force propelling the AKP towards more liberal Kurdish language policies (detailed below). As Cengiz and Hoffman point out, the impetus for some reforms, particularly those occurring after 2009, were domestic in nature (focused on the desire to secure Kurdish electoral support) because the EU’s commitment to the accession process declined.¹⁰⁸

Erdogan visited Diyarbakir in August 2005 and, in the words of *The Economist*, “became the first Turkish leader ever to admit that Turkey had mishandled its rebellious Kurds”.¹⁰⁹ There followed a slew of important, but limited, liberalising reforms; some of which were targeted at the Kurdish people.¹¹⁰ The early harmonization laws implemented in 2001 resulted in the amendment of Article 26 of the constitution dealing with the concept of “a language prohibited by law” and deleted the sentence “Publications shall not be made in any language prohibited by law” from Article 28.¹¹¹ Soon after, on 15 July 2003, Law 4928 annulled the part of Article 8 of the Anti-Terror Law that criminalised separatist propaganda, but on 29 June 2006 it was reintroduced as Article 7(2) of the Anti-Terror Law.¹¹² Kolçak has categorised the AKP’s Kurdish language policies into *trouble-free* policies (rather optimistically), *problematic*

¹⁰⁵ *Ibid*, 23.

¹⁰⁶ *Ibid*, 24.

¹⁰⁷ Commission of the European Communities, *Issues Arising from Turkey’s Membership Perspective* SEC(2004) 1202, 22.

¹⁰⁸ Firat Cengiz & Lars Hoffmann, ‘Rethinking Conditionality: Turkey’s European Union Accession and the Kurdish Question’ 51 *Journal of Common Market Studies* (2013) 416.

¹⁰⁹ *The Economist*, *Peace be unto you: the Turkish prime minister paves the way for a deal with the Kurds* (August 2005).

¹¹⁰ Firat Cengiz & Lars Hoffmann, *supra* n. 108, 421.

¹¹¹ For discussion of the 2001 constitutional amendments, see Levent Gönenç, ‘The 2001 Amendments to the 1982 Constitution of Turkey’ 1 *Ankara Law Review* (2004) 89.

¹¹² The law has since been amended several times. Human Rights Watch, *Silencing Turkey’s Media: The Government’s Deepening Assault on Critical Journalism* <https://www.hrw.org/sites/default/files/report_pdf/turkey1216_web.pdf> accessed 24/07/17, 22.

policies, and areas of AKP *silence*.¹¹³ The AKP's "trouble-free" policies include Kurdish broadcasting rights, Kurdish personal names, Kurdish place names, Kurdish in politics, and Kurdish language courses. The problematic policy concerns mother-tongue education in Kurdish. The AKP has been silent on the official use of the Kurdish language.

To begin with the trouble-free policies, Kurdish language broadcasting became legally possible under a Regulation of 2002, which allowed broadcasting in "languages and dialects traditionally spoken by Turkish citizens in their daily lives".¹¹⁴ An executive regulation issued by the Supreme Board of Radio and Television (RTÜK) in December 2002 gave effect to this statutory provision but was very limited in scope, applying only to the state-funded TRT network, specifying strict time limits on such broadcasts, requiring translation into Turkish, and specifying the type of broadcasts that were permitted.¹¹⁵ Private TV and radio broadcasting was permitted by a further EU harmonization law passed in 2003 and enforced by an RTÜK regulation in January 2004, but the other limitations remained in place.¹¹⁶ On 7 June 2004, for the first time in Turkish history, broadcasting commenced in some non-Turkish languages on state-run TRT, although the broadcasts were limited to news programs and limited in length.¹¹⁷ Three private media groups were authorised to broadcast in Kurdish dialects in March 2006 for a maximum of 45 minutes per day on television and an hour a day on radio.¹¹⁸

After some gradual improvements, RTÜK in November 2009 adopted a new regulation removing all restrictions on broadcasts. Soon after, in February 2010, RTÜK authorised fourteen media organisations to broadcast in Kurdish dialects.¹¹⁹ In June 2010 the first private Kurdish television channel *Dünya TV* started round-the-clock broadcasting.¹²⁰ Importantly, these regulations which, as Bayir points out, amounted to nothing more than *de facto* practices, have been given a legal foundation in the most recent media law: Law 6112 of February 2011. This converts the regulatory permission to broadcast in minority languages into a statutory permission and remains "the basic law of the Turkish media".¹²¹ Article 5(1) of Law 6112

¹¹³ Hakan Kolçak, 'Unfinished Building: Kurdish Language Rights During the First AKP Ruling Period from November 2002 to June 2015' 26 *Journal on Ethnopolitics and Minority Issues in Europe* (2016) 26.

¹¹⁴ *Ibid.*, 34.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, 35.

¹¹⁷ Derya Bayir, *supra* n. 57, 170.

¹¹⁸ *Ibid.*, 170.

¹¹⁹ Hakan Kolçak, *supra* n. 113, 36.

¹²⁰ Derya Bayir, *supra* n. 57, 170.

¹²¹ Hakan Kolçak, *supra* n. 113, 36.

provides that “Media services shall be essentially provided in Turkish” but that, subject to certain rules and procedures, “media services in languages and dialects other than Turkish may also be provided.” This is undoubtedly a very significant development, and a large step in the right direction, but it is not a *trouble-free* development. The “media service principles” contained in Article 8 of the law are very broad and, as recent developments have demonstrated, can easily be turned against Kurdish language broadcasters. For example, Article 8(1)(a) of Law 6112 provides that media services shall not “be contrary to the existence and independence of the State of the Republic of Turkey, the indivisible integrity of the State with its territory and nation, the principles and reforms of Atatürk.” Article 8(1)(b) provides that media services shall not “incite the society to hatred and hostility” by “making discrimination” on the grounds of, *inter alia*, language.¹²² Moreover, an amendment added via Decree Law 680 on 2 January 2017 in the context of the severe repression of the Kurdish community (and, indeed, *all* dissenting voices¹²³) under a state of emergency requires that media services shall not “glorify and encourage terror” or “display terrorist organisations as powerful or justified”. The latter formulation is particularly vague: saying practically anything about the Kurdish Question and the situation of Turkey’s Kurds could conceivably be construed as justifying the PKK, even if it does not directly justify the violent aspects of its methods. Violating these vague restrictions can lead to the temporary or permanent suspension of broadcasting by RTÜK¹²⁴, a body which is, according to Freedom House, “frequently subject to political pressure” and whose “board is currently dominated by members affiliated with the AKP”.¹²⁵ According to the Venice Commission, another amendment to Law 6112 “gives to the Supreme Council quasi-unlimited discretion to reject [applications for broadcasting licences] on the grounds of national security and public order” on the basis of secret information provided by national intelligence bodies –

¹²² A similar provision in Article 216 of the Penal Code was used to ban the HDP’s Kurdish language referendum song. Turkish Minute, *Minister says he ordered ban of HDP’s campaign song* <<https://www.turkishminute.com/2017/04/08/minister-says-ordered-ban-hdps-campaign-song/>> accessed 25/07/17.

¹²³ In July 2017, the Committee to Protect Journalists (CPJ) noted that Turkey “jailed more journalists than any other country had in any year since the [CPJ] began keeping records in the early 1990s.” See CPJ, *A year after attempted coup in Turkey, media landscape purged of critical voices* <<https://cpj.org/blog/2017/07/a-year-after-attempted-coup-in-turkey-media-landsc.php>> accessed 26/07/17

¹²⁴ Venice Commission, *Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media*, opinion no. 872/2016 at para. 15

¹²⁵ Freedom House, *Turkey: Freedom of the Press 2016* <<https://freedomhouse.org/report/freedom-press/2016/turkey>> accessed 25/07/17.

an amendment that “essentially gives the secret services discretionary power to block broadcasting licence applications, a power easily abused for political reasons”.¹²⁶

As was the case in Turkey’s recent past, these restrictions are ostensibly aimed at *Kurdism* rather than the use of the Kurdish language *per se*. But history, as well as recent developments, indicate that the suppression of *Kurdism* often overlaps with the suppression of the Kurdish language and Kurdish culture. Indeed, Amnesty International notes that during the ongoing state of emergency that followed the failed coup of 2016 and the ongoing war with the PKK, “almost all Kurdish newspapers, TV and radio stations, news agencies have been closed down”¹²⁷ after allegations of involvement with, or spreading propaganda for, terrorist organisations.¹²⁸ Although most of the closures have been based on emergency decree laws, the above analysis indicates that there is fertile ground for shifting the oppression of Kurdish broadcasters to Law 6112 and Turkey’s array of broad anti-terror laws. This will be easier to achieve thanks to the president’s influence over the judiciary, parliament, and RTÜK. Thus, the future of Kurdish broadcasting is dependent upon political whim rather than a well-crafted and effective legal framework guaranteeing Kurdish broadcasting rights.

The freedom to broadcast in the Kurdish language, like all other freedoms in modern Turkey, is precarious. There was a period of relative freedom that coincided with the AKP’s attempts to win-over Kurdish voters and move towards EU accession, followed by a period of intense oppression that coincided with the AKP’s attempts to win-over nationalist and ultra-nationalist voters. It has been a case of taking several steps forward and several steps back. The future of Kurdish language broadcasting remains to be seen, but recent developments have not been encouraging. It is difficult to see how the future of Kurdish broadcasting can be legally secured

¹²⁶ Venice Commission, *Opinion on the Measures Provided in the Recent Emergency Decree Laws with Respect to Freedom of the Media*, CDL-AD(2017)007, paras. 15-16.

¹²⁷ Amnesty International, *Turkey: Journalism is Not a Crime* <<https://www.amnesty.org/en/latest/campaigns/2017/02/free-turkey-media/>> accessed 25/07/17.

¹²⁸ For example, the Kurdish daily *Özgür Gündem* was closed down for being a source of propaganda for the PKK. See Rûdaw, *Turkey’s independent media show solidarity with closed Kurdish daily* <<http://www.rudaw.net/english/middleeast/turkey/170820162>> accessed 25/07/17. For a period of time, even a children’s television channel (*Zarok TV*) broadcasting in Kurdish was closed down; see Committee to Protect Journalists, *Turkey closes at least 20 TV, radio stations* <<https://cpj.org/2016/09/turkey-closes-at-least-20-tv-radio-stations.php>> accessed 25/07/17. *Zarok TV* was allegedly posing a “threat to national security” and “support[ing] terrorism” via such surreptitious actions as translating *SpongeBob SquarePants* into Kurdish; see The Guardian, *‘What about our human rights?’: Kurds feel force of Turkey’s crackdown* <<https://www.theguardian.com/world/2016/oct/06/what-about-our-human-rights-kurds-feel-force-turkeys-crackdown>> accessed 27/07/17

in a problem-free manner without ending the securitization of the Kurdish Question, and the broad anti-terror laws that go along with it.

The issue of Kurdish personal names is more straightforward. Starting in 2003, the AKP government amended the Civil Registry Law and allowed newborns to be given non-Turkish names provided they complied with the “moral values of the Republic” and were not offensive.¹²⁹ This was restricted by the 2004 circular of the Ministry of Interior Affairs, which prohibited names that used non-Turkish letters such as Q, W, and X, a prohibition that was based on Article 222 of the Penal Code which penalised the use of non-Turkish letters with between two and six months’ imprisonment.¹³⁰ The 2013 “democratization package” repealed Article 222 of the Penal Code and allowed newborns to be given Kurdish names including those containing non-Turkish letters.¹³¹

An active process of restoring Kurdish toponyms was being pursued from Spring 2014.¹³² The 2013 democratization package created a twofold procedure for restoring original Kurdish place names. Towns and cities could have their original names restored via Acts of Parliament, whereas villages, neighbourhoods and streets could have their original names restored via a three-step procedure: the Provincial Councils and Municipal Assemblies should make an official decision to restore the name, the Ministry of Interior Affairs should be notified of that decision, and the said Ministry should endorse that decision.¹³³ In November 2014, for example, the Ministry endorsed a decision to restore 704 Armenian and Kurdish place names.¹³⁴ The gradual restoration of Kurdish toponyms and street signs was thrown into reverse after the collapse of the ceasefire with the PKK in 2015 and the subsequent state of emergency imposed after the failed coup of 2016. Part of the AKP’s strategy for destroying democratic Kurdish political representation involved removing elected municipal co-mayors in Kurdish regions and replacing them with AKP appointed trustees.¹³⁵ These trustees have set about removing Kurdish language street signs and toponyms. For example, the Kurdish name for

¹²⁹ Hakan Kolçak, *supra* n. 113, 36.

¹³⁰ *Ibid*

¹³¹ *Ibid*, 37.

¹³² *Ibid*, 38.

¹³³ *Ibid*.

¹³⁴ *Ibid*.

¹³⁵ UN Office of the High Commissioner for Human Rights, *Report on the human rights situation in South-East Turkey: July 2015 to December 2016* <http://www.ohchr.org/Documents/Countries/TR/OHCHR_South-East_TurkeyReport_10March2017.pdf> accessed 26/07/17, paras. 70-74.

Diyarbakir (Amed) has been removed from some city signs¹³⁶ and in Van, a sign at the entrance of the Gürpınar district which read “You are welcome” in Kurdish and Turkish has been replaced with a sign saying “Goodbye” written in Arabic and Turkish.¹³⁷ Parks named after prominent Kurdish figures have also been renamed.¹³⁸

The ban on using languages other than Turkish in the making of political propaganda, which was contained in the Law on Political Parties, was removed by the Democratization Package.¹³⁹ This, according to the European Commission, allowed “the conduct of political activity in languages other than Turkish”.¹⁴⁰ Since then, three nationwide elections (the 2014 local elections and both 2015 parliamentary elections) saw the use of the Kurdish language. However, there has again been a significant amount of backsliding. During the 2017 referendum, for example, the HDP’s campaign song *Bejin Na* (Say No) was banned under Article 216 of the Penal Code for “[provoking] hatred or hostility in one section of the public against another section...” and a recent set of bylaws passed by the Turkish parliament prohibits the use of words such as “Kurdistan”, “Kurdish provinces”, “Kurdish region”, and “massacre” during legislative sessions.¹⁴¹ Even so, the use of the Kurdish language *per se* is no longer prohibited in the making of political propaganda.

Moving on to the AKP’s *problematic* reforms, the use of the Kurdish language in education is an issue of paramount significance because it is widely seen as one of the most important ways of ensuring that the language is passed from one generation to the next and that identities are preserved.¹⁴² It is, according to Zeydanlioglu, “at the heart of the Kurdish question in

¹³⁶ New York Times, *Amid Turkey’s Purge, a Renewed Attack on Kurdish Culture* <https://www.nytimes.com/2017/06/29/world/middleeast/amid-turkeys-purge-a-renewed-attack-on-kurdish-culture.html?_r=0> accessed 26/07/17.

¹³⁷ ANF News, *Kurdish signboard in Gürpınar replaced with an Arabic one* <<https://anfenglish.com/kurdistan/kurdish-signboard-in-guerpinar-replaced-with-an-arabic-one-21153>> accessed 26/07/17.

¹³⁸ For example, a park named after a prominent, recently assassinated, Kurdish lawyer was renamed. New York Times, *supra* n. 133.

¹³⁹ Law 6529 of 2014 amended Article 58 of Law 298 and provided “All kinds of propaganda of political parties and candidates may be in other languages and dialect [sic] than Turkish”. English translation available at: <<http://www.ysk.gov.tr/ysk/content/conn/YSKUCM/path/Contribution%20Folders/Ingilizce/298-en.pdf>> accessed 27/07/17.

¹⁴⁰ European Commission, *Turkey 2013 Progress Report*, SWD(2013), 6.

¹⁴¹ Kurdistan24, *Turkey Parliament bans words Kurdistan and genocide* <<http://www.kurdistan24.net/en/news/aaf38e56-bcf8-4cdb-9101-6504942ece5d>> accessed 26/07/17.

¹⁴² OSCE, *The Hague Recommendations Regarding the Education Rights of National Minorities & Explanatory Note* (1996), 2.

Turkey”.¹⁴³ It is one of the most important domains of language use without which it is difficult for a language to survive. As noted above, Article 3 of the Turkish constitution makes Turkish the language of the State and Article 42 provides that “No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of education.” Article 42 does, however, allow “foreign languages” to be taught in institutions of education subject to rules to be determined by law. Law 2923, passed in October 1983, was known as the *Foreign Language Education and Teaching Law* and essentially allowed a limited number of foreign languages, not including Kurdish, to be taught in Turkish schools. This created an absurd situation whereby one could choose to learn Japanese in a Turkish school but not Kurdish—a language native to millions of Turkish citizens.

Turkey has made some limited progress in the field of Kurdish language education since then. In August 2002, Article 11 of Law 4771 renamed Law 2923 the *Law on Foreign Language Education and Training and the Education of Turkish Citizens in different Languages and Dialects*. It also provided that private courses may be opened to teach “different languages and dialects traditionally used by Turkish citizens in their daily lives” subject to regulations to be published by the Ministry of National Education.¹⁴⁴ The regulations released by the Ministry imposed “petty bureaucratic hurdles to organizations seeking to commence lessons”¹⁴⁵ and only permitted courses to last for ten weeks and no more than 18 hours per week.¹⁴⁶ No State financial support was provided and, more seriously, no course could fulfil the instructor-related condition, namely that instructors have a bachelor’s degree in such linguistic programs (at the time, there were no Turkish facilities offering such degrees).¹⁴⁷ The instructor-related restriction was lifted in Article 23 of Law 4963 in 2003 and the first Kurdish language course opened in Batman in April 2004.¹⁴⁸

¹⁴³ Welat Zeydanlioglu, ‘Repression of Reform? An analysis of the AKP’s Kurdish language policy’ in Welat Zeydanlioglu & Cengiz Gunes (eds.), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation and Reconciliation* (Routledge 2013), 175.

¹⁴⁴ English translation available at:

<<http://www.ilo.org/dyn/natlex/docs/serial/68377/66629/f1942448432/tur68377.pdf>> accessed 26/07/17.

¹⁴⁵ Kerim Yildiz, *supra* n. 104, 70.

¹⁴⁶ *Ibid.*

¹⁴⁷ Hakan Kolçak, *supra* n. 113, 40.

¹⁴⁸ Nurcan Kaya, ‘Teaching in and Studying Minority Languages in Turkey: A Brief Overview of Current Issues and Minority Schools’ 2 *European Yearbook of Minority Issues* (2015) 317, 323.

In Autumn 2009 Turkey's Higher Education Board (YÖK) began to allow private and public universities to provide language courses in Kurdish dialects¹⁴⁹ and approved the application of Artuklu University to establish an *Institute of Living Languages* to offer postgraduate education in Kurdish and other regional languages.¹⁵⁰ It started providing the first MA program in the Kurdish language in 2010.¹⁵¹ Since then, several other universities in the Kurdistan region have been permitted to launch undergraduate, graduate, and postgraduate courses in Kurdish dialects.¹⁵² It is now possible to obtain qualifications ranging from a BA to a PhD in Kurdish language and literature.¹⁵³

In 2012-13, it became possible to learn some minority languages, such as Kurmanji and Zazaki dialects of Kurdish, via elective courses in some public schools.¹⁵⁴ Whether or not these elective courses are offered depends on demand, but schools are obligated to offer them if they are demanded by at least ten students.¹⁵⁵ In the school year 2015-16, the number of students enrolled in such courses reached 85,000.¹⁵⁶ This is, of course, a drop in the ocean and there is some evidence of problems with the appointment of teachers, the provision of textbooks, and pressure applied by school administrators to discourage the selection of such courses.¹⁵⁷ It is also problematic that the courses can only be taken at the higher education level, namely grades 5 - 8¹⁵⁸ and that they were introduced without the involvement of the affected minorities.¹⁵⁹

The most important facet of Kurdish language education is mother tongue education—education *via* the Kurdish language rather than the study *of* the Kurdish language. The former is an important usage domain for the Kurdish language whereas the latter, though valuable, is merely an opportunity to study the language once one has attained a certain age and already

¹⁴⁹ Hakan Kolçak, *supra* n. 113, 40-41.

¹⁵⁰ Welat Zeydanlioglu, *supra* n. 140, 172.

¹⁵¹ Nurcan Kaya, *supra* n. 148, 323.

¹⁵² *Ibid.*, 41-42.

¹⁵³ It should be emphasised that this development, as important as it is, has not been trouble-free. See F. Tastekin, *Politics strain Turkey's first Kurdish-language institute* <<http://www.al-monitor.com/pulse/originals/2014/11/turkey-kurdish-universities-unites-four-pieces-kurdistan.html>> accessed 27/07/17.

¹⁵⁴ Nurcan Kaya, *supra* n. 148, 324.

¹⁵⁵ Hakan Kolçak, *supra* n. 113, 42.

¹⁵⁶ *Ibid.*

¹⁵⁷ Nurcan Kaya, *supra* n. 148, 326.

¹⁵⁸ *Ibid.*, 324.

¹⁵⁹ *Ibid.*, 326.

been immersed in the majority Turkish language.¹⁶⁰ In this connection, Article 11 of Law 6529 paved the way for private schools to use languages and dialects other than Turkish as the language of instruction.¹⁶¹ Although this is a “taboo-breaking development”¹⁶² there have been severe problems putting the law into practice¹⁶³ and surveys have indicated that 76.5 per cent of people in predominantly Kurdish provinces have negative feelings about receiving mother tongue education via private schools and 91.4 per cent of people in the impoverished Kurdish regions would not be able to afford to send their children to such schools even if they wanted to.¹⁶⁴ As the co-chairman of an NGO on educational issues in Diyarbakir points out, “private schools would only be available for the elite few”.¹⁶⁵ In fact, the theoretical ability of private schools to provide education via the Kurdish language has been severely undermined since the war with the PKK restarted in 2015 and the failed coup in 2016. In Diyarbakir, for example, one of the AKP-appointed trustees who took over from the democratically elected mayors dismissed “80 percent of the staff of the municipal department that promoted the teaching of Kurdish and other minority languages” and cancelled the plans of the dismissed mayors to promote Kurdish courses.¹⁶⁶ Furthermore, the AKP used its emergency decree-making powers to dismiss tens of thousands of teachers in the Kurdistan region whom the prime minister accused of having “connections to terror”. A report published on 27 December 2016 noted that all five private schools providing Kurdish language education in the Kurdistan region had been closed down, leaving 238 students aged between five and 11 without a school place in the new academic year.¹⁶⁷ This was, in the first place, a strikingly low number of children receiving mother tongue education and demonstrates the poverty of the AKP’s reforms in this area. Even informal teaching of the Kurdish language has been prevented: Turkey’s Human Rights Association (IHD) noted in November 2016 that a *de facto* school run collectively by teachers

¹⁶⁰ The UNESCO Committee of Experts notes that “Education in the language is essential for language vitality.” UNESCO Ad Hoc Expert Group on Endangered Languages, *Language Vitality and Endangerment* (2003), 12.

¹⁶¹ Hakan Kolçak, *supra* n. 113, 44-45.

¹⁶² Nurcan Kaya, *supra* n. 148, 327.

¹⁶³ See Frederike Geerdink, *Kurds not giving up on education in mother tongue* <<http://www.al-monitor.com/pulse/originals/2014/09/turkey-kurds-education-in-mother-tongue-schools.html>> accessed 27/07/17.

¹⁶⁴ Nurcan Kaya, *supra* n. 148, 327-8.

¹⁶⁵ Wall Street Journal, *Kurdish Education Gets Off to a Troubled Start in Turkey* <<https://blogs.wsj.com/middleeast/2014/09/12/kurdish-education-gets-off-to-a-troubled-start-in-turkey/>> accessed 27/07/17

¹⁶⁶ New York Times, *supra* n. 133.

¹⁶⁷ The New Arab, *Kurdish schools shut down in Turkey* <<https://www.alaraby.co.uk/english/indepth/2016/12/28/kurdish-schools-shut-down-in-turkey>> accessed 27/07/17.

and families wishing to provide education in Kurdish was closed down on 9 October 2016. Oppressive actions such as these led to a call by the KCK for people to develop their own education system outside the State because “we need to rid ourselves of the Turkish education system which is for cultural and physical genocide”.¹⁶⁸

Beyond the limited (seemingly, at present, non-existent) ability of private schools to conduct education in Kurdish, the European Commission against Racism and Intolerance (ECRI) notes in its most recent report that “for the minority groups that are not protected by the 1923 Lausanne treaty, the teaching of non-Turkish languages as mother tongues is still prohibited by article 42.9 of the Turkish Constitution,” and that this “results in structural discrimination.” Turkey’s schools, which ought to be sites of intellectual and cultural development, are sites of assimilation and destruction of Kurdish culture and language. The ECRI suggests the authorization of mother tongue teaching for children from all minority groups as one possible way of remedying the problem.¹⁶⁹

Given the centrality of mother tongue education to the Kurdish Question in Turkey, and given the progress that has been achieved in other domains of Kurdish language use (while recognising the very serious recidivism of the last few years), this chapter will focus narrowly on Kurdish mother tongue education (MTE) in state schools. I will first present an argument to the effect that mother tongue education for linguistic minorities engages the right of self-determination. I will go on to consider individual human rights standards pertaining to mother tongue education that are applicable to Turkey. As explained in Chapter Four, the implementation of individual rights is not, strictly speaking, a self-determination remedy because they apply to the individual rather than the group; but they can be part of an overall response to a lack of self-determination and can help to further develop a state’s realisation of the right.. At the same time, group-based self-determination remedies are not individual rights-based remedies, but they can help to better fulfil certain individual rights standards.

Having examined the applicable human rights framework, I will turn to a consideration of various models of accommodation developed in other States. The point of this exercise is to

¹⁶⁸ ANF News, *KCK calls on Kurds to develop own democratic education system* <<http://anfenglish.com/kurdistan/kck-calls-on-kurds-to-develop-own-democratic-education-system>> accessed 27/07/17.

¹⁶⁹ European Commission against Racism and Intolerance, *ECRI Report on Turkey: fifth monitoring cycle*, CRI(2016)37, para. 85.

consider some ways in which the human rights framework can be linked-up with particular arrangements to better accommodate Kurdish linguistic demands.

5.5 *Mother tongue education and the right of self-determination*

Chapter Four explained that internal self-determination has several interlocking normative strains: first, it has the capacity to validate or legitimise a reorientation of the relationship between minority and state if that reorientation serves to increase the ability of the minority group to participate in political, cultural, economic, and social life. Second, it has a remedial dimension which is aimed at mitigating the pathologies arising from how sovereignty allocates sovereignty around the globe which, in practice, means offsetting the oppression resulting from nation-building projects. Third, it has a processual dimension which requires legitimate claims by minority groups to be taken seriously.

Taking the above understanding of internal self-determination as a base, two main interconnected arguments can be made to justify the relevance of MTE to the right of self-determination. These arguments can be categorised as the *cultural argument* and the *equality argument*. Both arguments are concerned more broadly with the first, participatory strand of internal self-determination. I argue that without taking reasonable and proportionate measures to protect and develop minority languages via the provision of MTE, the affected cultural and linguistic minority groups (because language is intimately tied together with culture) are likely to suffer from a whole range of disadvantages relative to the dominant linguistic group. These disadvantages seriously affect the ability of the affected group to pursue its own *cultural development* (and indeed its very *cultural existence*) as well as its ability to participate *politically, economically, and socially* on an equal footing with the majority language group.¹⁷⁰ In other words, the failure of a State to provide for education in minority languages seriously undermines the ability of the affected group to participate in political, economic, social and cultural life on the basis of equality. The *participatory* strain of internal self-determination therefore enjoins the governing order to be one that takes reasonable and proportionate steps

¹⁷⁰ This is also recognised by, *inter alia*, the UN Committee on the Rights of the Child (UNCRC), which notes that quality education of indigenous children (which, in many cases, will require mother-tongue education) is “an essential means of achieving individual empowerment and self-determination of indigenous peoples.” UNCRC, *General Comment No. 11* (2009), UN Doc. CRC/C/GC/11, para. 57.

to accommodate minority languages—particularly, as will be explained below, languages with a long history of presence on the State’s territory and languages which are territorially concentrated.

In addition, since the suppression of minority languages in public life is a common feature of nation-building projects—from the French revolution right through to the ongoing Turkish nation-building project—claims for group-based measures to protect and promote minority languages tend to engage the *remedial* dimension of internal self-determination.

State power can be disaggregated in various forms in order to effectively secure MTE for minority groups. I will argue, based on observations from other constitutional systems such as Spain, that territorial autonomy arrangements are the best way of ensuring that the Kurdish language will develop and thrive, but that other non-territorial autonomy arrangements, such as the one operating in Canada, could also be useful—particularly given the fact that a large number of Kurds are dispersed throughout Turkey. I will also argue that individual rights can be part of an overall response to self-determination claims, just as group-based self-determination remedies can help to further realise individual rights standards.

5.5.1 *The cultural argument*

In a 2003 report on language vitality and endangerment which was submitted to UNESCO, an ad hoc expert group on endangered languages pointed out that speakers of a particular language “may experience the loss of their language as a loss of their original ethnic and cultural identity”.¹⁷¹ Similarly, the Council of Europe’s *Advisory Committee on the Framework Convention for the Protection of National Minorities* points out that “Language is an essential component of individual and collective identity. For many persons belonging to national minorities, language is one of the main factors of their minority identity and identification”.¹⁷² For the UN’s Independent Expert on minority issues, “Language is often particularly important

¹⁷¹ UNESCO, *Language Vitality and Endangerment*, report of the Ad Hoc Expert Group on Endangered Languages (2003), p. 2.

¹⁷² Advisory Committee on the Framework Convention for the Protection of National Minorities, *Thematic Commentary No. 3: The Language Rights of Persons Belonging to National Minorities under the Framework Convention* (2012), para. 13.

to non-dominant communities seeking to maintain their distinct group and cultural identity, sometimes under conditions of marginalization, exclusion and discrimination”.¹⁷³ And for the OSCE, “language is a matter closely connected with identity”.¹⁷⁴

Article 1 of the UN General Assembly’s *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* requires States to “Protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities” and to “encourage conditions for the promotion of that identity”.¹⁷⁵ According to the UN Working Group on Minorities’ Commentary to the Declaration, Article 1 prohibits unwanted assimilation and efforts to undermine the group identity of persons living on the territory of the State.¹⁷⁶ This right not to be assimilated requires States to take positive action to protect group identities, and in that respect a State’s language and educational policies are “crucial”.¹⁷⁷ There were even early proposals to include a provision on cultural genocide in the Genocide Convention, which would have criminalised “any deliberate act committed with the intent to destroy the language... of a national, racial, or religious group...”. This would have included “Prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group”.¹⁷⁸ The suggested provision on cultural genocide stemmed in part from Raphael Lemkin’s observation that cultural genocide, as one of the methods of destroying the foundations of the life of national groups, could include attacks on a group’s language, such as forbidding the use of the language in schools or in printing.¹⁷⁹ In the end, the provision was dropped because of states’ quite widespread practices of assimilation and their desire not to criminalise their own behaviour.¹⁸⁰

There is, then, something of a consensus around the argument that language is an essential component of group identity, including the cultural aspects of that identity. In a *subjective*

¹⁷³ UN Human Rights Council, *Report of the Independent Expert on minority issues, Rita Izsák* (2012), UN Doc. A/HRC/22/49, para. 18

¹⁷⁴ OSCE, *The Oslo Recommendations regarding the Linguistic Rights of National Minorities & Explanatory Note* (1998), p. 2.

¹⁷⁵ UN General Assembly Resolution 47/135, UN Doc. A/RES/47/135, Article 1

¹⁷⁶ UN Economic & Social Council, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2005/2, para. 21.

¹⁷⁷ *Ibid*, para. 28.

¹⁷⁸ Elisa Novic, *The Concept of Cultural Genocide: An International Law Perspective* (OUP 2016), 25.

¹⁷⁹ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), 84.

¹⁸⁰ Elisa Novic, *supra* n. 178, 29.

sense, members of cultural groups often experience their language as an integral part of their identities—as a signifier of difference. In an *objective* sense, the death of one’s language will often lead to a degree of assimilation into another dominant culture. The argument is well supported by research, which indicates that in general a culture cannot survive even for a couple of generations if the language associated with that culture is lost.¹⁸¹

Why is it the case that a group’s language is so intimately bound-up with a group’s cultural identity? After all, culture is “a broad, inclusive concept encompassing all manifestations of human existence”¹⁸² and extends beyond the linguistic features of group identity. Part of the answer, as Fishman points out, is that there is a partial identity between language and culture: almost all of a culture’s non-material aspects, such as songs, prayers, laws, proverbs, philosophy and history, are stored in that culture’s language and passed down to succeeding generations.¹⁸³ If the language dies, then a great deal of the group’s cultural wealth goes to the grave with it. Incidentally, this is a problem not only for the affected group, but for the whole of humanity which, as Hale points out, is deprived of a part of humankind’s intellectual wealth along with its cultural wealth.¹⁸⁴ The loss of a group’s language can also have a domino effect, in the sense that language is one of the main props on which a culture rests, and the removal of that prop seriously weakens other props, which are henceforth more likely to be lost and altered.¹⁸⁵

Although there is a partial identity between language and culture, one should be careful not to overstate the case. Language is clearly not coterminous with culture: witness, for example, the differences between American, English, and Australian cultures, all of which are famously divided by a common language. The same argument applies on the level of the individual. For example, Selahattin Demirtas, the currently imprisoned leader of the “pro-Kurdish” HDP political party in Turkey, grew up speaking Turkish and only began to learn to speak Kurdish later in life. One can be a culturally active Kurd without the ability to speak fluent Kurdish. There are also examples of cultures losing their associated languages yet maintaining some of

¹⁸¹ Tove Skutnabb-Kangas, *Linguistic Genocide in Education – Or Worldwide Diversity and Human Rights?* (Lawrence Erlbaum Associates 2000), 119.

¹⁸² UN CESCR, *General Comment No. 21*, UN Doc. E/C.12/GC/21, para. 11.

¹⁸³ Joshua Fishman, *Reversing Language Shift: Theoretical and Empirical Foundations of Assistance to Threatened Languages*, (Multilingual Matters 1991), 24.

¹⁸⁴ Kenneth Hale, ‘On endangered languages and the safeguarding of diversity’ 68 *Language* (1992).

¹⁸⁵ Joshua Fishman, *supra* n. 183, 17.

their cultural specificities. As Fishman highlights, Jews who cannot speak Hebrew have existed for millennia, and Irishmen who cannot speak Irish have existed for centuries.¹⁸⁶ The problem, however, is that *much is lost in translation*. The culture that emerges after relinguification is not the same as the culture that would have existed without relinguification¹⁸⁷ and to impose a course of cultural development on the minority group is to undermine their right to make meaningful choices touching on all spheres of life, which is an important aspect of internal self-determination. In the language of Article 1 of the ICCPR and ICESCR, it prevents them from freely pursuing their cultural development. Instead, the course of their cultural development is, to a significant extent, *imposed upon them*. Furthermore, the fact that some degree of cultural specificity might remain after a language has been killed does not mean that language death should be recommended or tried.¹⁸⁸ As explained, language death is likely to have a knock-on effect in other aspects of the group's cultural identity.

A lack of reasonable and proportionate state action to protect and promote the Kurdish language therefore undermines Kurds' ability to participate in cultural life on the basis of equality with the Turkish majority. Although policies, whether direct or indirect, that bring about language death would not *necessarily* destroy Kurdish culture in its entirety, such policies do, at the very least, impose upon them a particular course of cultural development in violation of their right to make their own meaningful choices regarding cultural development. Furthermore, it is evident that many Kurds experience the oppression of their language as the oppression of their identity more broadly.

This is the cultural argument. It posits that languages ought to be protected and promoted for the sake of safeguarding cultural diversity and allowing linguistic groups more freedom to make their own decisions regarding their own cultural development.

5.5.2 *The equality argument*

¹⁸⁶ *Ibid*, 15.

¹⁸⁷ *Ibid*, 26.

¹⁸⁸ Tove Skutnabb-Kangas, *supra* n. 181, 253.

The most basic equality argument is that since language is an important aspect of cultural identity, its preservation and development requires a “supportive cultural and linguistic environment”.¹⁸⁹ The existence of such an environment is often taken for granted by the dominant linguistic group, which has the power to turn its language into the state’s official language and the language of commerce and education. In order to be on a more equal level, non-dominant groups require positive measures to grant them the same rights to the greatest possible extent. They need, in other words, to be given the space to freely develop their own language and their own culture—a freedom that the dominant language group takes for granted. But without the existence of such a supportive cultural and linguistic environment, the speakers of minority languages are likely to suffer from inequality *beyond* the cultural sphere. In fact, a lack of linguistic rights in the education system is very likely to lead to inequality in the economic, social, and political spheres. This, in turn, means that individual members of the linguistic group are unable to participate in the economic, social, and political spheres of life on the basis of equality with the dominant linguistic group; hence the relevance of the *participatory* normative strain of internal self-determination.

Perhaps the most important linguistic right in terms of reducing this inequality is the right to mother tongue education. Skutnabb-Kangas lists several consequences of dominant language-only education, which include the prevention of access to education, the curtailment of a child’s capabilities, and the perpetuation of poverty.¹⁹⁰ These consequences can lead to “economic, social and political marginalisation”¹⁹¹ thereby perpetuating the relatively powerless situation of minority groups and individual members thereof. If speakers of the minority language tend to underachieve compared to speakers of the dominant language, then the linguistic group as a whole is more likely to suffer from higher levels of poverty and deprivation. In many cases, this feeds negative stereotypes about “backward” or “uncivilized” communities and thereby perpetuates their marginalisation. In other words, a lack of MTE plays an important role in the reproduction of structural causes of oppression.

¹⁸⁹ Robert Dunbar, ‘Minority language rights in international law’ 50 *International & Comparative Law Quarterly* (2001) 90, 94.

¹⁹⁰ Tove Skutnabb-Kangas, ‘Multilingual Education for Global Justice: Issues, Approaches, Opportunities’ in Tove Skutnabb-Kangas et. al. (eds.), *Social Justice Through Multilingual Education* (Multilingual Matters 2009), 40.

¹⁹¹ *Ibid.*

Mohanty explains that “Educational failure of linguistic minorities all over the world is primarily related to the mismatch between the home language and the language of formal instruction”.¹⁹² Skutnabb-Kangas adds: “Research conclusions about results of present-day indigenous and minority education show that the length of mother tongue medium education is more important than any other factor (including socio-economic status) in predicting the educational success of bilingual students...”¹⁹³ In Turkey, for example, education can only be conducted in the Turkish language. Education cannot, according to the constitution, be conducted in any other language.¹⁹⁴ Interviews conducted with Kurds who have experienced this system of dominant language-only education indicate why this system leads to widespread educational failure. Young Kurds from the South-east who are raised as Kurdish speaking children often encounter Turkish for the first time when they go to school. Many of the interviewees in the DIPSA report stated that their inability to read or write in Turkish made them feel humiliated and damaged their self-confidence.¹⁹⁵ According to one interviewee:

“...we [Kurdish speaking children] started life with a defeat of 1-0, with a delay of 10-15 years. They [Turkish speaking children] were able to communicate... The lessons they learned at school they already knew from home. They were ready. They didn’t need to show extra effort. But we needed to make a great effort”.¹⁹⁶

According to another interviewee:

“...The feeling I had was of being left behind. At school at first you seem to learn a language. But you don’t actually get an education until you learn that language. That is why, when you look at the whole of Turkey, instead of only looking at the Turkish-Kurdish situation, I believe that when I compare myself with other people who don’t speak Kurdish, it is as if I began to receive education a year later.”

¹⁹² Ajit Mohanty, *Overcoming the Language Barrier for Tribal Children: Multilingual Education in Andhra Pradesh and Orissa, India* in *ibid*, 283.

¹⁹³ Tove Skutnabb-Kangas, *Forms of Education of Indigenous Children as Crimes Against Humanity?* (2008, UN Economic and Social Council), UN Doc. E/C.19/2008/7, para. 7.

¹⁹⁴ Article 42 of the Turkish constitution states: “No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institution of education.”

¹⁹⁵ DIPSA, *supra* n. 14, 49.

¹⁹⁶ *Ibid*, 51.

In fact, the report notes, “*Everyone* interviewed agreed that learning to read and write in an unfamiliar language resulted in being unsuccessful academically at school. Many claimed they could have accomplished more had they not had this hurdle to overcome”.¹⁹⁷ The inequality that results from this state of affairs is quite striking. It means that Kurdish children with a Kurdish mother-tongue generally perform worse in exams and tests than Turkish speaking children.¹⁹⁸ This in turn makes it more difficult to find work, which leads to poverty and exclusion.

Furthermore, Amartya Sen points out that good education advances not only social, cultural, and economic participation, but also participation in the exercise of *political* rights.¹⁹⁹ Widespread education is “essential to the practice of democracy”.²⁰⁰ In the same vein, the US Supreme Court noted (in a different context) in *Brown v. Board of Education* that education, made available on equal terms, is “required in the performance of our most basic public responsibilities” and is “the very foundation of good citizenship”.²⁰¹ If the educational standards of linguistic minorities are far below those of the dominant linguistic group due—at least in significant part—to the lack of available MTE, then the ability of the former to participate in political, economic, and social on the basis of equality with the latter is seriously undermined. This brings the *participatory* normative strain of internal self-determination into play and calls for particular self-determination remedies which are tailored to meet the needs of the particular situation.

This is the equality argument: it posits that a lack of linguistic rights can lead to *de facto* discrimination in the economic, social, and political spheres and thereby undermines the ability of affected linguistic groups to participate on the basis of equality in economic, social and political life.

¹⁹⁷ *Ibid*, 49.

¹⁹⁸ Although other factors also contribute to what International Crisis Group refers to as “The region’s abysmal performance in education,” including severe underinvestment by the State. The educational disadvantages suffered by Kurdish speakers are also noted by the UN Committee on the Rights of the Child: see UN Committee on the Rights of the Child, *Concluding observations: Turkey* (2012) UN Doc. CRC/C/TUR/CO/2-3, para. 58

¹⁹⁹ Amartya Sen & Jean Drèze, *India: Development and Participation* (OUP 2002), 4.

²⁰⁰ *Ibid*, 39.

²⁰¹ *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954) at p. 493

5.5.3 *Links between the cultural and equality arguments*

On its own, the equality argument is insufficient to ground normative claims for minority language rights in the long-term because the inequalities that result from a lack of linguistic rights could be resolved by speeding-up the diffusion of the dominant language across the whole of society. In order to gain access to economic and social opportunities which are only available via proficiency in the dominant language, but unavailable (or very scarce) in the minority language, one could either learn the majority language and pass it on to one's children, *or* action could be taken to make more of those opportunities available in the minority language.²⁰² At least in the medium to long term, both options could remove the inequality. Thus, the state that manages to turn Kurdish speakers into Turkish speakers successfully makes the former more equal with the latter: They can now participate in education without being hobbled by their Kurdish mother tongue. In other words, the equality argument on its own tends to see the minority language as an obstacle to be overcome, rather than as an asset to be preserved and developed. Thus, in order to ground normative claims for minority linguistic rights, aimed at the *development and preservation* of minority languages, the equality argument and the cultural argument must work in tandem. The central argument is the cultural argument, and the equality argument adds urgency to the need to protect and promote minority languages.

The most obvious way in which equality and culture are linked is in the wording of common Article 1 of the ICCPR and the ICESCR. All peoples have the right to freely pursue, *inter alia*, their cultural development and, as explained in previous chapters, "peoples" can be understood in a disaggregated sense. Thus, all groups and segments of society have the right, on the basis of equality, to pursue their cultural development. The governing institutional order ought to be one under which diverse cultural groupings are acknowledged and valued on the basis of equality.²⁰³

Another important way in which the equality argument is linked to the cultural argument concerns the way in which inequalities that are not directly related to cultural development and

²⁰² As Patten puts it: "an individual's interest in social mobility can be satisfied in two different ways. There can be a societal culture operating in a language that the individual speaks. Or the individual can integrate into a societal culture by learning the language in which it operates." Alan Patten, 'The rights of internal linguistic minorities' in Avigail Eisenberg & Jeff Spinner-Halev, *Minorities within Minorities: Equality, Rights and Diversity* (CUP 2005), 142.

²⁰³ James Anaya, 'A Contemporary Definition of the International Norm of Self-Determination' 3 *Transnational Law & Contemporary Problems* (1993) 131, 155.

survival (such as the economic inequalities mentioned above), and that result from the lack of, for example, mother tongue education, can coerce members of the minority language group into committing cultural suicide. The 2003 report on language vitality and endangerment, which was submitted to UNESCO by an ad hoc expert group on endangered languages, points out:

“Many indigenous peoples, associating their disadvantaged social position with their culture, have come to believe that their languages are not worth retaining. They abandon their languages and cultures in hopes of overcoming discrimination, to secure a livelihood, and enhance social mobility, or to assimilate to the global marketplace”.²⁰⁴

In another study, Crystal identified three broad stages of language death. First, speakers of the endangered language come under immense pressure to speak the dominant language in order to secure economic benefits, political benefits, social benefits or some combination of these. Second, there is a period of emerging bilingualism as speakers of the endangered language become increasingly proficient in the dominant language while maintaining competence in their old language. Third, the younger generation becomes proficient in the dominant language and the old language begins to give way. This generation identifies more closely with the dominant language and finds the old one less suited to its needs.²⁰⁵ According to Crystal, “Within a generation – sometimes even within a decade – a healthy bilingualism within a family can slip into self-conscious semilingualism, and thence into a monolingualism which places that language one step nearer to extinction”.²⁰⁶ Thus, the inequalities that result from a lack of linguistic rights will often coerce members of the minority linguistic group into abandoning their language and thereby changing the course of their cultural development. This has the effect of masking *coerced* assimilation as *voluntary* assimilation.

Qualitative studies conducted in the Kurdistan region of Turkey lend credence to Crystal’s analysis. The DIPSA report, for example, identifies a general tendency in language use among different generations of Kurdish speakers: “It can be noted that the first generation speaks Kurdish, that a mix of Kurdish and Turkish is used by the second and that the third uses

²⁰⁴ UNESCO, *supra* n. 171, 2.

²⁰⁵ David Crystal, *Language Death* (CUP 2000), 78-79.

²⁰⁶ *Ibid*, 79.

Turkish”.²⁰⁷ This process of decline has been compared with the death of the Irish language.²⁰⁸ The general tendency in language use can be attributed to a wide array of factors that vary between families and individuals depending on, for example, the level of education.²⁰⁹ But a common factor is the desire of older generations to secure for their children a more successful future by raising them to speak Turkish, and a desire to avoid the kind of prejudices that negatively affected them as speakers of the Kurdish language. The situation is neatly summarised by one of the second generation of bilingual Kurdish speakers interviewed for the DIPSA report:

“I speak Turkish with my children. With my mother and father I speak Kurdish. I will speak Turkish until he starts school. He should know Turkish before going to school so that he won’t have the problems I experienced. I had difficulties because I didn’t know Turkish. He shall not have the same problems.”

In order to avoid the inequalities that result from, *inter alia*, a lack of linguistic rights, many Kurdish parents opt to raise their children in the Turkish language. Even when they are raised in a bilingual household, many Kurdish children “choose Turkish unconditionally throughout their childhood”.²¹⁰ There seems to be a vicious cycle involved in this process insofar as the lack of MTE leads to educational underachievement and poverty; the poverty leads to racist stereotypes about Kurds; and in order to avoid the consequences of the racist stereotypes, some Kurdish parents do not want their children to have MTE.

The above arguments demonstrate that linguistic rights—particularly MTE—are a vitally important aspect of self-determination. It will be recalled that the *participatory* normative strain of internal self-determination stems from equality precepts and “requires that the governing institutional order itself be one in which individuals and groups live and develop freely on a continuous basis”.²¹¹ In order for linguistic minority groups to live and develop

²⁰⁷ Handan Çağlayan, *supra* n. 8, 63.

²⁰⁸ Dylan O’Driscoll, ‘Is Kurdish Endangered in Turkey? A Comparison Between the Politics of Linguicide in Ireland and Turkey’ 14 *Studies in Ethnicity and Nationalism* (2014) 270.

²⁰⁹ A study by Smits and Gündüz-Hosgör notes that there appears to be a “strong relationship between going to school and speaking Turkish” among the Kurds. Welat Zeyneloglu et. al., ‘Language Shift Among Kurds in Turkey: A spatial and demographic analysis’ 4 *Kurdish Studies* (2016) 25, 41. The DIPSA report notes that “with the progress of education, Turkish becomes the language of thought and expression in addition to becoming the language of reading and writing.” Hamdan Çağlayan, *supra* n. 8, 68.

²¹⁰ Hamdan Çağlayan, *supra* 8, 71.

²¹¹ James Anaya, *supra* n. 203, 155.

freely, and more particularly to freely pursue their cultural development, attention must be paid to the preservation and development of their languages. The particular remedies needed to fulfil the participatory normative strain of self-determination will depend on the circumstances of each individual case.

5.5.4 *The remedial argument*

As noted in Chapter Two, projects of nation-building which go hand-in-hand with the construction of nation-states have a tendency to demand linguistic uniformity. In the case of the French Revolution, imposing a uniform French language upon a multilingual population was perceived as a necessary tool for forging a unified national identity. A common language was the glue which would hold the nation together. As the above depiction of the Turkish nation-building project shows, the same broad dynamic has taken root in Turkey; assimilating linguistic minorities into the Turkish language—particularly via dominant language education—was and is perceived as an absolute necessity in order to join the global family of nation-states. One can therefore say without hesitation that linguistic assimilation is one of the pathologies that tends to arise from the way in which international law allocates sovereignty around the globe. In the Kurdish case, the allocation of sovereignty to Turkey but not to Kurdistan left a large ethnolinguistic minority in Turkey's midst, and this was seen as an obstacle to the construction of a new and secure nation-state, unified by language, culture and religion. This common pathology needs to be mitigated, and the provision of MTE is one important way in which it can be done. Therefore, both the *participatory* and the *remedial* strains of the right of self-determination are engaged.

5.6 *Mother tongue education and individual rights*

As noted in Chapter Four, the group right of self-determination overlaps with rights to non-discrimination, minority rights, and other specific individual rights standards. It is therefore necessary to consider how these individual rights standards interface with the claim for MTE.

It should be noted from the outset that none of the binding international human rights instruments at the international level provide a clear and unambiguous right to MTE. At the

regional level, particularly the European level, several instruments deal with MTE but the pertinent provisions tend to be quite ambiguous and it is clear that Turkey has decided against submitting itself to any of those direct MTE obligations. Furthermore, despite the progressive attempts of various advisory committees and so-called “soft law” instruments to draw states’ attention to the importance of MTE, judicial and quasi-judicial discourse at both the international and European levels has been quite conservative and unwilling to recognise a right to MTE based on the need to support minority groups, or individual members thereof, to freely pursue their cultural development.

5.6.1 *Non-discriminatory access to education*

Various international and regional human rights instruments approach MTE in terms of the right to non-discrimination. For example, Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises a right to education and states that it should be directed to the full development of the human personality and enable all persons to participate effectively in a free society. Pursuant to Article 2 ICESCR, this right is to be granted without discrimination based on, *inter alia*, language. The Committee on Economic, Social and Cultural Rights (CESCR) notes that it interprets “discrimination” in the light of the UNESCO Convention Against Discrimination in Education (CADE)²¹² which includes as a form of discrimination any distinction, exclusion, limitation or preference based on, *inter alia*, language which has the effect of “limiting any person or group of persons to education of an inferior standard”.²¹³ According to the CESCR, education must be available to all *in fact* as well as *in law* without this kind of discrimination. Although the ICESCR does not recognise a right to MTE, it can be argued that Turkey’s blanket insistence on monolingual Turkish language education constitutes a form of indirect discrimination against Kurdish speaking children—in other words, it is a *preference* based on language which has the effect of limiting Kurdish speaking children to education of an inferior standard. As mentioned in Chapter Four, indirect discrimination of this kind can be remedied by treating different situations differently and (unlike the law pertaining to positive measures taken in pursuit of *de facto* equality) can be done on a more-or-less permanent basis.

²¹² CESCR, *General Comment No. 13: The Right to Education*, UN Doc. E/C.12/1999/10, para. 31.

²¹³ UNESCO Convention Against Discrimination in Education, Art. 1(1)(b).

In this case, it is desirable to implement some form of MTE. The importance of MTE to improving and equalising the standard of education for Kurdish children has indeed been recognised by the UN's Special Rapporteur on the right to education, who noted in 2002 that there existed in Turkey "linguistic obstacles"²¹⁴ to education and that the provision of MTE would enable non-Turkish speaking children to "exercise their right to education in the education system".²¹⁵ That being said, the CADE (to which Turkey is not a State party) does not recognise a right to MTE in state-funded schools, opting instead to recognise a more limited right of members of national minorities to maintain their own schools and use their own language, and even that right "[depends] on the educational policy of each state".²¹⁶ Whatever the merits of MTE to the non-discriminatory realisation of the right to education, neither the ICESCR nor the CADE explicitly recognise it as a state obligation. Even so, the provision of MTE is one useful way of equalizing the standard of education between majority and minority language speakers and action taken to implement MTE for particular language groups, such as the establishment of separate minority language schools, will not, according to Article 5(1)(c) of CADE constitute discrimination.²¹⁷

A non-discrimination approach is also pursued in Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination, which provides that states parties shall guarantee the right of everyone, without distinction as to, *inter alia*, national or ethnic origin, the right to education and training. In that connection, the Committee on the Elimination of Racial Discrimination noted in its General Recommendation on Discrimination against Roma that states should "keep open the possibility for bilingual or mother-tongue tuition".²¹⁸ In fact, the Convention in Article 2(2) explicitly *requires* states to take concrete measures to ensure the equal enjoyment of human rights, such as the right to education.²¹⁹ Again, the Convention does not recognise a right to MTE but the progressive work of its associated treaty monitoring body reveals that the implementation of MTE can be a valuable mechanism for

²¹⁴ UN Commission on Human Rights, *Report submitted by Katarina Tomaševski, Special Rapporteur on the right to education: Mission to Turkey 3-10 February 2002*, UN Doc. E/CN.4/2002/60/Add.2, para. 62.

²¹⁵ *Ibid.*, p. 3.

²¹⁶ UNESCO Convention Against Discrimination in Education, Art. 5(1)(c).

²¹⁷ *Ibid.*, Art. 2(b). Also see the individual opinion of M. Scheinin in *Waldman v. Canada* who points out that MTE is not discriminatory provided "distinctions between different minority languages are based on objective and reasonable grounds": UNHRC, *Waldman v. Canada*, Communication No. 694/1996, para. 5.

²¹⁸ UN Committee on the Elimination of Racial Discrimination, *General recommendation XXVII* (2000), para. 18.

²¹⁹ See Committee on the Elimination of Racial Discrimination, *General recommendation No. 32*, UN Doc. CERD/C/GC/32.

achieving non-discriminatory access to education. For example, in its Concluding Observations on Canada's twenty-first to twenty-third periodic reports, the Committee notes its concern at the lack of sufficient funding for MTE programmes, especially for African-Canadian and indigenous children²²⁰ and refers to its contribution to 'future socioeconomic disparity' among these groups. In consequence, the Committee recommends that Canada should 'ensure equal access to quality education for all children'.²²¹ This suggests that the CADE views the provision of MTE as one valuable measure which states ought to consider taking.

Some regional human rights instruments also take a non-discrimination approach to MTE, either in whole or in part. For example, Article 12 of the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM), to which Turkey is not a state party, provides that states parties "undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities." In its third thematic commentary, the Advisory Committee notes of Article 12 that language may "constitute a significant 'gate-keeping factor'" and that "disadvantages and discrimination can result from the exclusion of minority languages from education [and] from a lack of adequate possibilities to learn (in) minority languages..."²²² Some of the disadvantages are manifested in high drop-out rates, high illiteracy rates, low enrolment, school exclusion and considerable under-representation in secondary and higher education.²²³ Although Turkey is not a state party to the FCNM, the fact that so many striking disadvantages can result from a lack of MTE lends credence to the argument that a failure to provide it could amount to discrimination in access to education, as defined in the CADE and the ICESCR.

The European Convention on Human Rights does not contain a minority rights provision²²⁴ but it does contain a right to education (Article 2 of Protocol 1) and a right to non-discrimination based on such grounds as association with a national minority (Article 14). The

²²⁰ UNCERD, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada* (13 September 2017) UN Doc. CERD/C/CAN/CO/21-23, para. 29.

²²¹ *Ibid.*, para. 30(a).

²²² Advisory Committee on the Framework Convention for the Protection of National Minorities, *Thematic Commentary No. 3*, ACFC/44DOC(2012)001 rev, para. 68.

²²³ *Ibid.*

²²⁴ Although the jurisprudence of the European Court of Human Rights is not completely deaf to the concerns of minority groups and individuals. See for example Geoff Gilbert, 'The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights' 24 *Human Rights Quarterly* (2002) 736.

European Court of Human Rights (ECtHR) has, however, refused to recognise that the right to education on the basis of non-discrimination entails a right to MTE. As the Court put it in the well-known *Belgian Linguistics* case, “Article 14, even when read in conjunction with Article 2 of the Protocol... does not have the effect of guaranteeing to a child or to his parent the right to obtain instruction in a language of his choice”.²²⁵ The right to education merely entailed the right to be educated in the national language or one of the national languages.²²⁶ The Court recognised that education must be guaranteed without discrimination based on language but having considered the particular features of the Belgian education system and its linguistic divisions the Court concluded that the failure to provide MTE was not discriminatory. The ECtHR did, however, find a violation of Article 2 of Protocol 1 in the case of *Cyprus v. Turkey*²²⁷ a case where the self-declared “Turkish Republic of Northern Cyprus” allowed Greek speaking children to receive primary education in their own language but prevented them from receiving MTE at secondary level. However, Gilbert argues that this case “may be peculiar to the situation in Northern Cyprus”²²⁸ and, as Paz points out, the Turkish Republic of Northern Cyprus did not have an obligation to provide Greek language education in the first place.²²⁹

There is only quite limited and tentative support for MTE in these instruments, and it is driven by the progressive work of treaty monitoring bodies and advisory committees. The texts of the relevant treaties, even where they take a relatively broad understanding of the concept of non-discrimination, avoid explicitly granting MTE rights. Furthermore, the work of the ECtHR has been quite conservative. Even so, from a non-discrimination perspective one can argue that provision of MTE can be *one valuable way* of ensuring that language groups have equal access to quality education. Indeed, the disadvantages accruing to Kurdish speaking children in Turkish schools are easy to discover. The DIPSA study, for example, provides examples of how the lack of MTE “results in significant disadvantages for Kurdish children when they begin school, as well as throughout their schooling”.²³⁰ The study notes that both students and

²²⁵ ECtHR, *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium* (Merits), (1968), para. 11.

²²⁶ *Ibid* at para. 3. The same approach has been followed in later cases, such as *Case of Catan and Others v. Moldova and Russia* (2012).

²²⁷ European Court of Human Rights, *Case of Cyprus v. Turkey* (2001).

²²⁸ Geoff Gilbert, *supra* n. 224, 762.

²²⁹ Moria Paz, ‘The Failed Promise of Language Rights: A Critique of the International Language Rights Regime’ 54 *Harvard International Law Journal* (2013) 157, 185.

²³⁰ DIPSA, *supra* n. 14, 80

teachers believe that Kurdish speaking children “are at a great disadvantage in comparison to children whose mother tongue is Turkish” and that they begin schooling with “a 1-0 deficit”.²³¹

It is difficult to see how this state of affairs is anything other than the *de facto* limitation of Kurdish speaking children to an inferior standard of education relative to Turkish speaking children. Even though there is no explicit legal obligation to provide MTE in order to remedy or reduce the discrimination, it is clearly one very important way in which the standard of education enjoyed by Turkish speaking and Kurdish speaking children can be made more equal.

5.6.2 *Minority rights*

Unlike non-discrimination arguments, which tend to regard minority languages as an obstacle to the realisation of other rights, a minority rights approach to MTE emphasises the links between language and culture and seeks to preserve and develop them for the sake of allowing the linguistic group to protect and develop its own culture and identity. This approach is evident in several international and regional instruments.

International standards on minority rights can be found, among other sources, in both Article 27 of the ICCPR, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (which is inspired by, and informs the interpretation of, Article 27). Article 27 provides that persons belonging to, *inter alia*, linguistic minorities “shall not be denied the right” to use their own language and enjoy their own culture, among other things. Although this is couched in negative terms, the Human Rights Committee (HRC) notes that it entails a positive obligation to “ensure that the existence and exercise of this right are protected against their denial or violation”.²³² Furthermore, the Declaration on the Rights of Minorities goes further in providing in Article 1 that “States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity.” The associated commentary to the declaration explains that it aims to “make it possible for persons belonging

²³¹ *Ibid*, 81.

²³² HRC, *General Comment No. 23*, UN Doc. HRI/GEN/1/Rev.1 (1994), para. 6.1.

to minorities to preserve and develop their group identity”.²³³ The contours of minority rights were considered in more detail in Chapter Four.

In its explanation of Article 1 of the Declaration, the commentary of the Working Group on Minorities draws a distinction between integration and assimilation. Integration “differs from assimilation in that while it develops and maintains a common domain where equal treatment and a common rule of law prevail, it also allows for pluralism”.²³⁴ Minority integration is encouraged while non-assimilation and its corollary, namely the obligation to “protect and promote conditions for the group identity of minorities”²³⁵ is described as one of the four requirements of minority protection. In that connection, the commentary notes that “Denying minorities the possibility of learning their own language and of receiving instruction in their own language... would be a violation of the obligation to protect their identity”.²³⁶ This appears to go considerably further than the actual text of the Declaration, which provides in Article 4(3) that states should take appropriate measures so that “wherever possible” persons belonging to minorities have the opportunity to learn their mother tongue *or* to have instruction in their mother tongue. The restricted language of Article 4(3) is described by Beiter as “lamentable” because it provides that states “should” rather than “shall” take appropriate measures and it appears to present study *of* the language and study *in* the language as alternatives.²³⁷

The Recommendations of the UN Forum on Minority Issues, which was set-up by the UN Human Rights Council in order to “identify and analyse best practices, challenges, opportunities and initiatives for further implementation of [the Declaration on the Rights of Minorities]”²³⁸ tackles the problem identified by Beiter. It repeats the formulation in Article 4(3) of the Declaration but adds that study *of* the language and study *in* the language are “alternatives which should not be understood as mutually exclusive²³⁹.” It adds that “ideally”

²³³ UN Economic and Social Council, *Commentary of the working group on minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2005/2 (2005), para. 4.

²³⁴ *Ibid*, para. 22.

²³⁵ *Ibid*, para. 27.

²³⁶ *Ibid*, para. 28. Capotorti made a similar observation in his 1979 study, noting that the capacity of a minority to survive as a cultural group is jeopardised if no instruction is given in their mother tongue. Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 604.

²³⁷ Klaus Dieter Beiter, *The Protection of the Right to Education by International Law* (Brill 2006), 147.

²³⁸ UN Human Rights Council, *Resolution 6/15: Forum on Minority Issues* (2007) at para. 1

²³⁹ UN Human Rights Council, *Recommendations of the Forum on Minority Issues (15 and 16 December 2008)*, UN Doc. A/HRC/10/11/Add.1 at para. 58

school language regimes should employ MTE at the initial stages of education with the gradual introduction of the dominant language at a later stage.²⁴⁰

The formulation that states should provide MTE or language studies “wherever possible” appears to give states a lot of leeway to arbitrarily avoid implementing Article 4(3). However, the commentary to the Declaration notes that states should pay attention to the size of the linguistic group, the nature of its settlement (i.e. whether it is territorially concentrated) and whether it is a “long-established minority”.²⁴¹ Languages which are territorially concentrated, traditionally spoken, and used by many ought to be protected “to the maximum” of the State’s available resources.²⁴² The commentary echoes the recommendations of the Working Group: “Pre-school and primary school education should ideally in such cases be in the child’s own language”.²⁴³ As explained above, the Kurdish minority is partly territorially concentrated in southeast Turkey, its language is spoken by millions of citizens of Turkey, and it has a very long history of presence on the state’s territory, pre-dating the birth of the Turkish Republic. Based on these ‘soft law’ instruments, Turkey should not dismiss claims for Kurdish MTE out-of-hand and ought to provide reasoned justifications (based on, among other things, the limits of its available resources) for rejecting those claims.

Furthermore, the right to take part in cultural life recognised by Article 15(1)(a) of the ICESCR means that persons belonging to minorities have the right to “conserve, promote and develop their own culture”.²⁴⁴ By dint of that entitlement, they are said to have the right to, *inter alia*, their own forms of education and their own languages.²⁴⁵ The obligation to fulfil the right to take part in cultural life requires states to take legislative, budgetary and other measures “aimed at the full realization of the right...”²⁴⁶ Culture, in this context, encompasses language.²⁴⁷ At a minimum, states are obligated to take legislative and other steps to ensure that everyone can take part in cultural life without discrimination.

²⁴⁰ *Ibid*, para. 59.

²⁴¹ *Supra* n. 230, para. 60.

²⁴² *Ibid*, para. 61.

²⁴³ *Ibid*.

²⁴⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21* (2009), UN Doc. E/C.12/GC/21, para. 32.

²⁴⁵ *Ibid*.

²⁴⁶ *Ibid*, para. 48.

²⁴⁷ *Ibid*, para. 13.

Whether or not one can identify an unambiguous legal obligation to provide MTE to the Kurdish minority in Turkey, the report of the Working Group and the commentary to the Declaration on Minority Rights both indicate that the provision of MTE is an important aspect of the preservation and promotion of the Kurdish identity and Kurdish culture. Given the size of the Kurdish linguistic group, its (partial) territorial concentration, and the long-established nature of its settlement, they ought to be strong candidates for linguistic protection and promotion. According to the so-called ‘soft law’ instruments cited above, Turkey is obligated to protect the Kurdish language to the maximum of its available resources.

Certain regional human rights instruments also take a minority rights approach to MTE. For example, the FCNM states in its preamble that signatory states are “resolved to protect within their respective territories the existence of national minorities” and considers that a “pluralist and genuinely democratic society” ought to go beyond *respecting* minority identities by creating “appropriate conditions enabling them to express, preserve and develop this identity”. Article 14 provides that “every person belonging to a national minority has the right to learn his or her minority language” and, in terms redolent of the Declaration on the Rights of Minorities, adds that the parties shall “endeavor to ensure, as far as possible and within the framework of their education systems” that linguistic minorities “have adequate opportunities for being taught the minority language or for receiving instruction in this language.” This, according to the Advisory Committee on the FCNM, is linked to the preservation of individual identity.²⁴⁸ Again, the FCNM draws state’s attention to territorially concentrated and long-established minorities (such as the Kurds) in particular.

Various so-called “soft-law” instruments of the OSCE address the issue of MTE from a minority rights perspective. The Copenhagen Document on the Human Dimension of the CSCE, for example, notes that persons belonging to national minorities have the right to, *inter alia*, preserve and develop their cultural and linguistic identity and to “maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will”.²⁴⁹ In that connection, it notes that states will endeavor to ensure that persons belonging to such minorities have “adequate opportunities” for instruction *of* or *in* their mother tongue.²⁵⁰ Although this

²⁴⁸ Advisory Committee on the FCNM, *supra* n. 169, para. 72.

²⁴⁹ OSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (1990), para. 32.

²⁵⁰ *Ibid*, para. 34.

draws participating states' (including Turkey's) attention to the importance of MTE to the preservation of minority identities and the right of minorities not to be assimilated against their will, it does not identify MTE as a right. Indeed, paragraph 32 of the Document provides a list of rights belonging to minorities, which excludes the right to MTE in state schools, opting instead for the more limited right to establish private schools.

The OSCE Hague Recommendations recall that “education is an extremely important element for the preservation and the deepening of the identity of persons belonging to a national minority”.²⁵¹ They go on to consider “The spirit of international instruments” and note that “The right of persons belonging to national minorities to maintain their identity can only be fully realised if they acquire a proper knowledge of their mother tongue during the educational process”.²⁵² The Recommendations note that according to educational research, MTE should be available at pre-school and kindergarten levels and that “wherever possible” States should “create conditions enabling parents to avail themselves of this option²⁵³.” Furthermore, the Recommendations note, educational research suggests that MTE should ideally be available in primary school and that the dominant State language should be taught “as a subject on a regular basis²⁵⁴.” The Recommendations suggest the gradual introduction of the dominant state language. Again, the Recommendations draw states' attention to the importance of MTE to the preservation and development of minority identities and the right of minorities not to be assimilated against their will, but stop short of identifying MTE as an unambiguous right.

Finally, the preamble of the European Charter for Regional or Minority Languages (to which Turkey is not a State party) notes that the protection of “the historical regional or minority languages of Europe” contribute to “the maintenance and development of Europe's cultural wealth and traditions”. As the associated Explanatory Report notes, “the charter's overriding purpose is cultural”.²⁵⁵ In that connection, it provides a kind of *à la carte* menu of provisions that states can opt to guarantee.²⁵⁶ Article 8 provides a long list of MTE options and the

²⁵¹ OSCE, *The Hague Recommendations Regarding the Educational Rights of National Minorities* (1996), p. 2

²⁵² *Ibid*, para. 1.

²⁵³ *Ibid*, para. 11.

²⁵⁴ *Ibid*, para. 12.

²⁵⁵ Council of Europe, *Explanatory Report to the European Charter for Regional or Minority Languages* (1992), para. 10.

²⁵⁶ As the Explanatory Report notes, the Charter sets out to promote languages rather than minorities and it does not, therefore, create any individual or collective rights. *Ibid*, para. 11.

Explanatory Report points out that the use of minority languages in a range of domains, including in education, is the only way in which those languages can be preserved and developed.²⁵⁷ The place accorded to minority languages is, according to the Explanatory Report, a “crucial factor” in their maintenance and preservation. States should, therefore, select from among the various possible MTE provisions under Article 8 according to the concrete situation of the language in question. Like the other instruments examined above, the Explanatory Report notes that, generally speaking, “stronger” MTE options should be selected for territorially concentrated languages with a large number of speakers.²⁵⁸ Although the Charter does not create any individual or collective rights, and although Turkey is not bound by any of its provisions, it does at least highlight the importance of MTE to the preservation and development of minority identities and the right of minorities not to be assimilated against their will.

5.6.3 *Children’s rights*

The UN Convention on the Rights of the Child (CORC) protects the rights of children under the age of eighteen. Several of its provisions are pertinent to the issue of MTE. Article 28 recognises the right of the child to education and provides that states shall, among other things, take measures to encourage regular attendance and reduce drop-out rates. Article 29 provides that education shall be directed to, *inter alia*, the development of respect for the child’s cultural identity and language, and the development of the child’s personality. Article 30 of the Convention is closely linked with Article 27 of the ICCPR and, according to the Committee on the Rights of the Child, provides indigenous children in particular with the right to be educated in their own language.²⁵⁹ The overall objective of education, according to the Committee, is to “maximise the child’s ability and opportunity to participate fully and responsibly in a free society”.²⁶⁰ The Convention also includes, in Article 2, a generic non-discrimination provision. According to the Committee discrimination in this context can be overt or hidden and the existence of discrimination directly contradicts the requirement in Article 29(1)(a) that

²⁵⁷ *Ibid*, para. 10.

²⁵⁸ *Ibid*, para. 46.

²⁵⁹ UN Committee on the Rights of the Child, *General Comment No. 11* (2009), UN Doc. CRC/C/GC/1, para. 62.

²⁶⁰ UN Committee on the Rights of the Child, *General Comment No. 1* (2001), UN Doc. CRC/GC/2001/1, para. 12.

education be directed to the development of the child's personality.²⁶¹ States are required to actively identify children and groups of children "the recognition and realization of whose rights may demand special measures"²⁶² and ought to collect disaggregated data in pursuit of that obligation.

There is no reason why the provision of MTE should not be one possible method of meeting the obligation to provide the right to education on a non-discriminatory basis, particularly given the fact that the Committee's concluding observations on Turkey note the "educational disadvantages" that accrue to the children of non-recognised minorities whose mother tongue is not Turkish²⁶³ and recommends that Turkey "Consider means of providing education in languages other than Turkish, particularly in primary schools in areas where other languages, in addition to Turkish, are widely spoken".²⁶⁴ Turkey has, however, made earnest efforts to exclude the applicability of several of these provisions to children from its Kurdish minority. Turkey's reservation to the Convention "reserves the right to interpret and apply the provisions of articles 17, 29 and 30... according to the letter and spirit of the Constitution of the Republic of Turkey and those of the Treaty of Lausanne..." As explained above, Article 42 of the Turkish constitution bars languages other than Turkish from being used as the medium of education, while reserving the provisions of international treaties such as the Treaty of Lausanne. This has the effect of limiting the range of application of the pertinent articles of the Convention to children from particular non-Muslim minorities while excluding other minorities. It is, in other words, an effort to discriminate against children from excluded minorities. Although the law of treaty reservations is far from clear-cut, one can at least construct a plausible argument that the reservation is invalid, based on the argument that it contravenes the object and purpose of the treaty *and* on the argument that the reservation would have the treaty applied in a discriminatory way.²⁶⁵

MTE can be a valid way of meeting various other obligations under the Convention. For example, the obligation under Article 28 (which is not subject to Turkey's reservation) to "take

²⁶¹ *Ibid*, para. 10.

²⁶² *Supra* n. 256, para. 24.

²⁶³ UN Committee on the Rights of the Child, *Concluding Observations: Turkey* (2012), UN Doc. CRC/C/TUR/CO/2-3 at para. 58(g)

²⁶⁴ *Ibid*, para. 59(g).

²⁶⁵ Thomas Phillips, 'The (In-)Validity of Turkey's Reservation to Article 27 of the International Covenant on Civil and Political Rights', *International Journal on Minority and Group Rights* (2019) 1.

measures” to reduce drop-out rates and increase attendance could be met, at least in significant part, by providing MTE. There is evidence from the DIPSA report that Kurdish speaking children in Turkish schools “who found it difficult to learn Turkish and failed their class generally quit school within a few years”²⁶⁶ and that the difficulty they encounter in a monolingual school environment “goes a long way to explaining the low rate of school attendance among children studying in regions where Kurdish is spoken...”²⁶⁷ The TESEV *Roadmap* adds that “school attendance is very low because of high drop-out rates and absenteeism”²⁶⁸ and the Committee on the Rights of the Child’s concluding observations on Turkey note that “net secondary school enrolment rates in rural Eastern provinces are extremely low”.²⁶⁹ The UN’s Independent Expert on minority issues noted in a 2012 report that drop-out rates can be reduced by “Teaching children for a recommended six to eight years in their mother tongue and gradually introducing national languages...”²⁷⁰.

The obligation under Article 2 to ensure Convention rights to each child without discrimination of any kind, and the obligation under Article 29(1)(a) to direct education to the “development of the child’s personality, talents and mental and physical abilities to their fullest potential”, could also be met via the provision of MTE. In that connection, the Committee on the Rights of the Child notes that education must be aimed at ensuring, *inter alia*, that “no child leaves school without being equipped to face that challenges that he or she can expect to be confronted with in life” and that basic skills such as literacy and numeracy are an important aspect of that aim²⁷¹. And yet, in Turkey, studies reveal that the literacy rate in the Kurdistan region is considerably lower than in the rest of Turkey²⁷². This is, to a significant degree, a result of the lack of MTE.

One can argue, therefore, that MTE is one important way in which various children’s rights can be fulfilled even though the Convention itself does not contain an explicit right to MTE.

²⁶⁶ DIPSA, *supra* n. 14, 82.

²⁶⁷ *Ibid.*

²⁶⁸ This is not solely attributable to the lack of MTE. The report also notes, for example, that many Kurdish children of primary school age have to work in the fields with their families in order to eke out a living. TESEV, *supra* n. 12, 27.

²⁶⁹ UN Committee on the Rights of the Child, *supra* n. 33 at para. 58(b)

²⁷⁰ UN Independent Expert on minority issues, *supra* n. 41 at para. 51

²⁷¹ UN Committee on the Rights of the Child, *supra* n. 33 at para. 9

²⁷² A December 2010 survey cited by International Crisis Group shows that more than 17 per cent of the province is illiterate compared with 8 per cent nationwide. The problem is even more acute for women and girls, among whom the literacy rate is to 56 per cent compared with 81 per cent for women nationwide. See International Crisis Group, *supra* n. 13 at p. 12

Indeed, although there are no international or regional human rights instruments to which Turkey is bound that explicitly recognise a right to MTE, one can argue that international and regional human rights bodies, agencies and organisations are increasingly drawing states' attention to the vital importance of MTE to a whole range of individual human rights.

The fact that Turkey has several linguistic minorities should not be an obstacle to granting MTE to the Kurdish minority. There are grounds for arguing that it would not be discriminatory to take immediate action to grant MTE to Kurdish speakers due to the size of the Kurdish minority, its territorial concentration, and its long history of presence on the territory.

5.7 Mother tongue education and international human rights law: conclusion

Although none of the international human rights laws examined above contains an explicit right to MTE, it is at least possible to narrate certain claims to MTE as consistent with those norms, or as ways of giving fuller expression to those norms. A full understanding of the group right of self-determination must be concerned with the preservation and development of minority languages, because this is bound-up with the ability of the minority group to participate more fully in cultural life as well as in political, economic and social life. Moreover, since the pursuit of linguistic uniformity is so often a feature of nation-building projects, the *remedial* dimension of internal self-determination validates and legitimises claims for MTE. Positive measures taken by States to provide MTE to particular linguistic groups will not constitute discrimination provided those measures are reasonable, objective and proportionate responses to *de facto* discrimination arising from the lack of available MTE; and provided they are discontinued when substantive equality has been sustainably achieved²⁷³. Distinguishing between various linguistic minorities in the provision of MTE will not necessarily amount to discrimination provided those distinctions are based on objective and reasonable grounds. Such grounds include the size of the linguistic minority, its territorial concentration, its historical presence on the State's territory, and any structural discrimination or market unfairness that the linguistic group has faced. Such grounds add weight to the claim for MTE.

²⁷³ UNCESCR, *General Comment No. 20* (2 July 2009) UN Doc. E/C.12/GC/20, para 9.

Overall, despite the lack of a clear right to MTE both individual and group rights within international law offer strong normative support to the Kurdish claim for MTE. It is necessary for the Kurds to be able to participate more equally *and* it is an important way of more fully realizing various individual human rights standards.

The next section will consider some models of MTE accommodation in order to link the foregoing theoretical and normative discussion to self-determination practice.

5.8 *Possible models of accommodation*

As mentioned previously, Turkey's Kurds are both territorially concentrated in particular parts of southeastern Turkey and dispersed across the rest of Turkey. Therefore, any self-determination arrangement aimed at providing MTE to Turkey's Kurds ought to extend beyond the mostly Kurdish South-east. The need to secure MTE to Kurds living outside South-east Turkey means that some form of non-territorial autonomy arrangement is crucial. While bearing in mind the need to be cautious when comparing different situations, it is nevertheless valuable to examine how some states have dealt with MTE claims which are similar in some important respects to the Kurdish claim.

The following subsections aim to illustrate how the Kurdish claim to MTE might be realised in Turkey by engaging with two existing models of MTE education. Given the aforementioned need to combine territorial and non-territorial arrangements, an example of each has been selected from Canada (non-territorial) and Spain's Basque Country (territorial). There are, of course, many more models from which one could have chosen, so it is necessary to write a few words in justification of this choice. First, simple exigencies of space prevent a fuller comparative analysis of multiple autonomy models. This is a task worth doing in future work and it might be tentatively suggested that the territorial autonomy model in Quebec—which takes a more muscular approach to Francophone MTE than the Basque Country—and the non-territorial autonomy model in Finland are worth discussing. Second, while one must be cautious when comparing different countries with different histories, societies, economies, and politics, there are certain similarities that make the models worthy of comparative study. In the

case of Canada's dispersed Francophone population, they—like Turkey's Kurds—tend to be concentrated in particular parts of the state's territory and tend to have suffered marginalisation at the hands of the dominant Anglophone community. Canada's non-territorial autonomy model is a thoughtful and tested way of both providing MTE and maintaining Francophone culture in such circumstances. In Canada, the Francophone population is both territorially concentrated in Quebec (where 77.4 per cent of the population has a French mother tongue²⁷⁴) and dispersed across other parts of Canada (3.8% of the population of Canada outside Quebec has a French mother tongue²⁷⁵). Similarly, Turkey's Kurds are both territorially concentrated in parts of southeast Turkey and dispersed across other parts of Turkey.²⁷⁶ Canada's approach to MTE therefore incorporates some non-territorial elements, which are worth exploring. In the case of Spain's Basque Region, the Basque language (Euskara) was suppressed during Franco's dictatorship and was on the path to extinction—one factor among many that sustained the violence of ETA. The similarities with the situation of Kurdish in Turkey are quite clear, and the Basque Country's territorial autonomy model therefore represents a successful ongoing attempt to reverse that trend.

5.8.1 *Non-territorial autonomy model: Canada*

Behiels summarises the problems that have faced Canada's Francophones ever since confederation as consisting of “a dominant ideology of cultural and linguistic homogeneity in conjunction with sacrosanct provincial autonomy...”²⁷⁷ As Bourgeois puts it, ‘Canada's first century repeatedly witnessed sociolinguistic conflicts between a vulnerable Francophone minority and intolerant Anglophone majorities in control of provincial functions and institutions’.²⁷⁸ This mistreatment of Francophones outside Quebec, which involved policies

²⁷⁴ Statistics Canada, ‘The evolution of language populations in Canada, by mother tongue, from 1901 to 2016’ (*Statistics Canada*, 21 February 2018) <<http://www.statcan.gc.ca/pub/11-630-x/11-630-x2018001-eng.htm>> accessed 06/03/2018.

²⁷⁵ *Ibid.*

²⁷⁶ “As many Kurds live in western Turkey, particularly in Istanbul, as in the southeast...”: International Crisis Group, *Turkey's Kurdish Impasse: The View from Diyarbakir* (2012) <<https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/turkey-s-kurdish-impasse-view-diyarbakir>> accessed 07/03/2018, i.

²⁷⁷ Michael D. Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance*, (McGill 2004), xxiii.

²⁷⁸ Daniel Bourgeois, ‘Minority Educational Self-Management in Canada’ in Tove Malloy et. al., *Managing Diversity through Non-Territorial Autonomy: Assessing Advantages, Deficiencies and Risks* (OUP 2015), 144.

against French-language education²⁷⁹, contributed to the rise of the Quebec secessionist movement²⁸⁰, which was itself the cue for Canada's eventual recognition of linguistic rights in education via the *Charter of Rights and Freedoms*. Erdos argues that Canadian federal elite politicians were motivated to entrench those rights due to the presence of a 'threat to political stability trigger', namely the emergence of a new nationalism among Francophone Quebecers that threatened the position of the federal government.²⁸¹ The recognition of, *inter alia*, linguistic rights in education was an attempt to oppose the centripetal force of Quebec secessionism by fostering a new pan-Canadian identity and securing the vitality of a federal Canada.²⁸² The eventual outcome of these efforts was the *Canadian Charter of Rights and Freedoms*, section 23 of which guarantees a limited but important right to MTE. Under section 23 of the Charter:

“[C]itizens of Canada whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province”.

This right to receive MTE is qualified in section 23(3) by a quantitative assessment of the number of children who will take advantage of the right. Section 23(3)(a) provides that the right “applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction”, Section 23(b) adds that the right to MTE “includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds”.

At first glance, section 23 of the Charter inaugurates an individual rights based approach to MTE. The right is held by individual parents who belong to a qualifying linguistic group. There

²⁷⁹ *Ibid*, 141.

²⁸⁰ *Ibid*, 145.

²⁸¹ David Erdos, *Delegating Rights Protection: The Rise of Bills of Rights in the Westminster World* (OUP 2010), ch. 5.

²⁸² *Ibid*, 72.

is no direct and unambiguous mention of any form of group right for English or French linguistic minorities in the article. However, the Canadian Supreme Court's liberal interpretation of article 23 has led to the incremental application of a kind of hybrid territorial-non-territorial autonomy model to qualifying linguistic groups. The most important Supreme Court judgment pertaining to section 23 is *Mahe v. Alberta*.²⁸³ The primary issue raised in *Mahe* was whether or not, or to what extent, section 23 included a right to "management and control" of minority language schools.²⁸⁴ The Supreme Court took the opportunity to elaborate upon the purpose of section 23. According to the Supreme Court, section 23 has a remedial purpose that is "designed to correct, on a national scale, the progressive erosion of minority official language groups and to give effect to the concept of the "equal partnership" of the two official language groups in the context of education".²⁸⁵ The concept of "equal partnership" had been explored by the *Royal Commission on Bilingualism and Biculturalism*, which noted that it referred to equal opportunities for both Francophones and Anglophones to participate in all aspects of collective life.²⁸⁶ Crucially, this understanding of equality emphasises that *individual* equality "can only exist if each community has, throughout the country, the means to progress within its culture and to express that culture".²⁸⁷ Consequently, in order to give effect to the concept of equal partnership the Court chose to read section 23 as conferring a *group* right that 'places positive obligations on government to alter or develop major institutional structures'.²⁸⁸ In so doing, the court moved beyond an individualistic approach to MTE and emphasised the importance of MTE rights to the fuller realisation of self-determination, introducing in the process a clear group-based self-determination dimension to section 23 of the Charter. Having read section 23 as a group right, it was open to the Court to begin incrementally developing a right to a particular kind of non-territorial autonomy.²⁸⁹

The Court in *Mahe* developed a 'sliding scale' approach to section 23 of the Charter. As the Court put it, section 23 requires "whatever minority language educational protection the

²⁸³ [1990] 1 SCR 342.

²⁸⁴ *Ibid*, 360-361.

²⁸⁵ *Ibid*, 363-364.

²⁸⁶ Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: General Introduction: Book 1 – The Official Languages* (1976), xxxix – xivii.

²⁸⁷ *Ibid*, xlv.

²⁸⁸ *Mahe v. Alberta*, *supra* n. 286, 365.

²⁸⁹ For an overview of the development of non-territorial autonomy in this context see: St  phanie Chouinard, 'The Rise of Non-Territorial Autonomy in Canada: Towards a Doctrine of Institutional Completeness in the Domain of Minority Language Rights' 13 *Ethnopolitics* (2014) 141.

number of students in any particular case warrants. Section 23 simply mandates that governments do whatever is practical in the situation to preserve and promote minority language education”.²⁹⁰ At a minimum, where numbers warrant, section 23 requires that instruction take place in the minority language. In some cases, where numbers warrant, section 23 requires a separate school board for parents belonging to the linguistic minority and a measure of management and control of minority schools.²⁹¹ In some cases, where an entirely separate school board is not warranted, representation of the linguistic minority group on the majority school board might be sufficient provided the representatives of the minority group are given ‘exclusive control over all of the aspects of minority education which pertain to linguistic and cultural concerns’²⁹². As the Court noted, the right of management and control accrues to the linguistic minority group, and is exercised by particular parents belonging to that group²⁹³.

The extent of autonomy required by the sliding scale approach to section 23 is contingent upon “the number of persons who will eventually take advantage of the contemplated programme or facility”.²⁹⁴ The Court in *Mahe* accepted that it was impossible to know that figure exactly, but considered that it could be “roughly estimated by considering the parameters within which it must fall – the known demand for the service and the total number of persons who potentially could take advantage of the service”.²⁹⁵ Canadian provinces have a legal duty to assist in determining the scale of that potential demand and cannot avoid their constitutional duties by citing insufficient proof of numbers.²⁹⁶ The Court reasoned that a group-based self-determination approach to section 23 involving various levels of management and control by members of the linguistic minority group was vital if section 23 was to serve its purpose of preserving and promoting minority languages and cultures throughout Canada. Various educational management issues, such as curricula, hiring and expenditure were said to affect linguistic and cultural concerns, and the court considered it ‘incontrovertible that the health and survival of the minority language and culture can be affected in subtle but important ways

²⁹⁰ *Mahe v. Alberta*, *supra* n. 286, 367.

²⁹¹ *Ibid*, 369.

²⁹² *Ibid*, 375-376.

²⁹³ *Ibid*, 372-373. Also see *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3, 33.

²⁹⁴ *Ibid*, 384.

²⁹⁵ *Ibid*.

²⁹⁶ *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3, 29.

by decisions relating to those issues’.²⁹⁷ Given the fact that “the majority cannot be expected to understand and appreciate all of the diverse ways in which educational practices may influence the language and culture of the minority”²⁹⁸ the court reasoned that “If section 23 is to remedy past injustices and ensure that they are not repeated in the future, it is important that minority language groups have a measure of control over the minority language facilities and instruction”.²⁹⁹ This reasoning serves to highlight the importance of group-based self-determination approaches to cultural preservation and development at the individual level.

The particular model developed by the Canadian Supreme Court in *Mahe* can be described as a kind of hybrid territorial and non-territorial autonomy model. It is non-territorial because the autonomous entity is described in personal rather than territorial terms: the right to management and control of minority schools and school boards belongs to the linguistic minority group, whether Francophone or Anglophone, rather than to the inhabitants of a particular territory as a whole. But it is also a partly territorial model because the larger the number of eligible parents on a particular territory, the more powers they can manage exclusively.³⁰⁰ Thus a linguistic minority group living on one territory might have greater autonomy than a linguistic minority group living on another territory.

This particular autonomy model was thought necessary because of the specific characteristics of Canadian linguistic diversity. Part of the rationale underlying this model is explained by the *Royal Commission on Bilingualism and Biculturalism*, which studied several models of linguistic accommodation around the world—some based on the personality principle and others on the territorial principle (see Chapter Four)—before recommending something similar to the setup developed by the Supreme Court in *Mahe*.³⁰¹ According to the Commission, a purely non-territorial model based on the personality principle was unsuitable for Canada because of its low levels of bilingualism and the fact that its official language minorities made

²⁹⁷ *Mahe v. Alberta*, *supra* n. 286, 372.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid.*, 372-373.

³⁰⁰ Daniel Bourgeois, ‘Minority Educational Self-Management in Canada’ in Tove Malloy et. al., *Managing Diversity through Non-Territorial Autonomy: Assessing Advantages, Deficiencies and Risks* (OUP 2015), 147.

³⁰¹ Note that the Commission shied away from recommending full control of school boards, suggesting instead that one school board (with linguistic minority representation reflective of the minority group’s size) should be responsible for the administration of all schools. Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: Book II – Education* (1968), paras. 437-441.

up less than 14 per cent of the population in nine out of ten provinces.³⁰² Given the limited to non-existent population density of official language minorities in certain parts of Canada, there was no need to offer minority language services in all parts of all provinces of the country. Furthermore, the lack of bilingualism meant that Canada's "linguistic resources" were too limited to successfully implement such a wide-ranging non-territorial model.

The Commission also noted that territorial models of accommodation such as those existing in Switzerland and Belgium were not suited to Canada's linguistic landscape. Whereas Belgium and Switzerland had permanent linguistic frontiers established over centuries by custom and legislation, Canada's population was considered too mobile to adopt a rigid territorial model.³⁰³ The resultant synthesis is the model first outlined in *Mahe* and developed in subsequent cases like *Arsenault-Cameron*. To the Commission's reasoning the Court added that where the number of students enrolled in minority schools is quite small, isolation of those minority schools and the provision of independent school boards might serve to *frustrate* the remedial purpose of section 23.³⁰⁴

Although section 23 of the Canadian Charter of Rights and Freedoms takes a particularistic Canadian approach to MTE, it links-up with more universal international human rights law standards. Indeed, Canada's Justice Minister explained during the passage of the Charter through Parliament that it would reflect Canada's adherence to the International Covenant on Civil and Political Rights.³⁰⁵ One can see, for example, that the Supreme Court's concern with the remedial purpose of section 23 (in terms of the need to correct the progressive erosion of certain minority language groups) combined with its insistence that section 23 confers group rights is reflective of the remedial aspects of the right of self-determination. In other words, the progressive erosion of minority language communities is one of the 'pathologies'³⁰⁶ arising from how international law allocates and regulates sovereignty in Canada. The right to minority management and control of schools is a form of sovereignty disaggregation helps to mitigate that pathology. In pursuing the cultural preservation and development of minority language communities by disaggregating sovereignty and transferring powers to minority language

³⁰² Royal Commission on Bilingualism and Biculturalism, *Report of the Royal Commission on Bilingualism and Biculturalism: General Introduction: Book 1 – The Official Languages* (1967), 84.

³⁰³ *Ibid.*

³⁰⁴ *Mahe v. Alberta*, *supra* n. 286, 374.

³⁰⁵ Michael D. Behiels, *Canada's Francophone Minority Communities: Constitutional Renewal and the Winning of School Governance*, (McGill 2004), 62.

³⁰⁶ Patrick Macklem, *The Sovereignty of Human Rights* (OUP 2015), 34.

groups, section 23 of the Charter is one method of furthering the realisation of the right of self-determination. It is a way of furthering the ability of official language minorities to more fully participate in the life of the State.

At the same time, section 23 confers both *group* rights to management and control of minority schools and school boards, and *individual* rights to MTE (the latter accrues to eligible individual parents rather than the individual child). Both the individual and the group elements of section 23 can be understood as mechanisms for more fully realising an array of individual human rights standards, such as the right to education on the basis of non-discrimination (Article 2 of the CORC)³⁰⁷ and the right to the protection and promotion of cultural and linguistic identities (Article 1 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities).³⁰⁸ Thus, even though the primary purpose of the *Charter* might have been to counter the centripetal force of Quebec secessionism, certain of its provisions can be validly understood as ways of furthering international human rights standards.³⁰⁹

Despite many obvious differences, there are some important similarities between the position of minority francophone communities in Canada and Kurdish communities in Turkey. Perhaps most importantly, the available evidence suggests that those Kurds who internally migrate from the mostly Kurdish speaking regions of South-eastern Anatolia generally tend to settle in particular parts of Turkey. While two-thirds of Kurds continue to reside in their traditional homeland, roughly one-third of Turkey's Kurds are living elsewhere in Turkey³¹⁰ and the available data suggests that those Kurds tend to take-up residence in regions of Marmara, the Aegean, and the Mediterranean. Very few can be found in the Central Anatolia and Black Sea regions.³¹¹ Furthermore, levels of Turkish-Kurdish bilingualism among ethnic Turks are low

³⁰⁷ In this regard, the Supreme Court in *Arsenault-Cameron* referred to the importance of section 23 in 'providing the official language minority with equal access to high quality education in its own language'. *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 SCR 3, 25.

³⁰⁸ In this regard, the Supreme Court in *Mahe* noted that 'The general purpose of s. 23 is clear: it is to preserve and promote the two official languages of Canada, and their respective cultures...'. *Mahe v. Alberta*, [1990] 1 SCR 342, p. 362.

³⁰⁹ For more on the links between the Charter and public international law see Maxwell Cohen & Anne Bayefsky, 'The Canadian Charter of Rights and Freedoms and Public International Law', (1983) *Canadian Bar Review* 265.

³¹⁰ Sinan Zeyneloglu, Yaprak Civelek & Ibrahim Sirkeci, 'Inter-Regional Migration and Inter-marriage Among Kurds in Turkey', 9 *Economics and Sociology* (2016) 139, 150.

³¹¹ *Ibid.*, 150-151.

even though most Kurds in Turkey are bilingual.³¹² This is unsurprising given the relative power of the Turkish language and the longstanding lack of Kurdish language teaching, alongside the stigma attached to those who speak Kurdish. As noted earlier in this chapter, the Kurdish language is atrophying and remedial measures are required in order to halt and reverse that trend. There are, therefore, several broad similarities between the situation of Kurdish speakers in Turkey and French speakers in Canada. Arguably, a Canada-style model would be useful for Turkey because it would focus on those areas of the country outside of the Kurdistan region, namely parts of the Marmara, Aegean and Mediterranean regions, that contain significant numbers of Kurdish speakers and would, where numbers warrant, entail management and control of Kurdish schools by members of the Kurdish linguistic group. This latter, group-based aspect of the Canadian model is arguably an essential component of any viable approach to Kurdish MTE due to decades of oppression and tension. Kurdish speakers are more likely to be satisfied with MTE and MTE is more likely to be successful in preserving and promoting Kurdish language and culture if Kurds themselves have the power to direct their own education, or at least those aspects of it that pertain to their culture and their language.

5.8.2 *Territorial autonomy model: the Basque Region*

The Basque language, or Euskara, is a non-Indo-European language of unknown provenance³¹³ which is spread across parts of Spain and France. Spain's Basque Autonomous Community (BAC) comprises the provinces of Álava, Guipuzcoa, and Biscay. Euskara was banned under the Franco dictatorship and the self-government of the Basque region was abolished.³¹⁴ State repression added to a pre-existing process of language erosion whereby the dominant languages of Castilian and French had, by the middle of the nineteenth century, begun to dominate in education, commerce and public life to the extent that Euskara survived mainly as a home language.³¹⁵ At the beginning of the twentieth century, 83 per cent of the population of the

³¹² Sinan Zeyneloglu et. al., 'Language Shift Among Kurds in Turkey: A spatial and demographic analysis', 4 *Kurdish Studies* (2016) 25, 41.

³¹³ Mercator European Research Centre on Multilingualism and Language Learning, *The Basque language in education in Spain*, (2nd ed.) (2005) <<https://files.eric.ed.gov/fulltext/ED535414.pdf>> accessed 07/04/2018, 7.

³¹⁴ Minority Rights Group International, *Basques* <<http://minorityrights.org/minorities/basques/>> accessed 07/04/2018.

³¹⁵ Jacqueline Urla, *Reclaiming Basque: Language, Nation, and Cultural Activism* (University of Nevada 2012), 2-3.

BAC could speak Euskara; after the Franco dictatorship, only 24 per cent of the population of the BAC could speak Euskara.³¹⁶

Spain's 1978 constitution reconceived the Spanish state as a quasi-federal entity. Section 3 of the constitution provides that Castilian is the official language of the state, but that other Spanish languages shall be official in the respective self-governing communities. Power over the education system is shared between the state, region, province and local council. The Spanish state defines the basic parameters of the education system, including most of the curriculum, while the regional governments are responsible for language policy and some parts of the curriculum.³¹⁷ The BAC's Statute of Autonomy provides that Euskara has the status of an official language and that inhabitants of the BAC have the right to know and use both Euskara and Castilian (Article 6(1)). It also provides that BAC institutions shall "guarantee the use of both languages" and "effect and regulate whatever measures and means are necessary to ensure knowledge of them" (Article 6(2)). Article 16 adds that, subject to relevant provisions of the Spanish constitution, the BAC is responsible for education.

Three models of language schooling are available in the BAC. The 'A-Model' is intended for Castilian speakers who wish to be instructed in that language, but Euskara is taught as a subject. The outcome is said to be "minimal proficiency in Basque as a second language".³¹⁸ The 'B-Model' is intended for those who wish to be bilingual in both Castilian and Euskara. In general, both languages are used equally as the medium of instruction.³¹⁹ The 'D-Model' uses Euskara as the language of instruction and Castilian is taught as a subject.³²⁰ Parents have the right to choose which model is best for their children. There is no law to the effect that education *will* take place in Euskara. The D-Model of language schooling is the most popular: in 2011-12, 63 per cent of pupils studied in the D-Model and another 20 per cent in the B-Model.³²¹ This

³¹⁶ David Lasagabaster, 'Bilingualism, Immersion Programmes and Language Learning in the Basque Country' 22 *Journal of Multilingual and Multicultural Development* (2001) 401, 403.

³¹⁷ Mercator European Research Centre on Multilingualism and Language Learning, n 378, 14.

³¹⁸ Durk Gorter and Jasone Cenoz, 'Multilingual education for European minority languages: The Basque Country and Friesland', 57 *International Review of Education* (2011) 651, 657.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ Basque Department of Culture and Language Policy, *Sociolinguistic Evolution of Basque Language (1981-2011)*, http://www.soziolinguistika.eus/files/euskararen_bilakaera_soziolinguistikoa_eng_2.pdf (accessed 07/04/2018), 9.

represents a substantial increase over the statistics from 1983-84, when only 14.1 per cent of pupils studied in the D-Model.³²²

The positive effect of this MTE system in preserving and promoting Euskara and slowly reversing its long decline is evident from the Basque Government's sociolinguistic surveys. The most recent available survey (2013) reveals that over the last 20 years, the use of Euskara has increased in the BAC in all domains except in the home.³²³ Levels of bilingualism have also increased over the same period: twenty years prior to the survey, 22.5 per cent of people aged 16 to 24 were bilingual, while the 2011 figure stood at 46.8 per cent.³²⁴ These positive trends compare favourably with the situation in the northern (French) regions of the Basque Country, where Euskara has never been used by the authorities and most primary schools only use the French language.³²⁵ While levels of bilingualism are increasing in the BAC, they are decreasing in the French regions.³²⁶ The different trends in the BAC and the French regions have been interpreted, at least in part, as a consequence of the deliberate policies pursued by the BAC government to reverse the waning vitality of Euskara.³²⁷

The BAC government implements a system of MTE as but one part of a broader strategy aimed at protecting and promoting Euskara. The territorial disaggregation of Spanish sovereignty allows the BAC government to set particular language policies and have them managed and coordinated by local institutions (in the BAC example, the Sub-Ministry for Language Policy).³²⁸ The BAC government has a 'General Plan for Promoting Basque Language Use', which 'serves as a framework to systematically tie in the different sectorial program plans to normalize the use of Basque with the realistic ambition of increasing the use of the language

³²² Miren Mateo, 'Language policy and planning of the status of Basque, I: The Basque Autonomous Community (BAC)' 174 *International Journal of the Sociology of Language* (2005) 9, 13.

³²³ Basque Department of Culture and Language Policy, *Fifth Sociolinguistic Survey* (2013) <http://www.euskara.euskadi.eus/contenidos/informacion/sociolinguistic_research2011/en_2011/adjuntos/FithSociolinguisticSurvey.pdf> accessed 07/04/2018, 46.

³²⁴ *Ibid.*, 23.

³²⁵ Mercator European Research Centre on Multilingualism and Language Learning, *The Basque language in education in France* (2nd ed.) (2007) <http://www.hezkuntza.ejgv.euskadi.eus/contenidos/informacion/dia6/en_2027/adjuntos/publications_in_english/basque_language_in_education_in_france_1998_en.pdf> accessed 08/04/2018, 17-18.

³²⁶ Basque Department of Culture and Language Policy, *Fifth Sociolinguistic Survey* (2013) <http://www.euskara.euskadi.eus/contenidos/informacion/sociolinguistic_research2011/en_2011/adjuntos/FithSociolinguisticSurvey.pdf> accessed 07/04/2018, 21.

³²⁷ Maria Jose Azurmendi, 'Reversing Language Shift: The Case of Basque' in Joshua Fishman (ed), *Can threatened languages be saved?* (Multilingual Matters 2001), 236.

³²⁸ Miren Mateo, *supra* n. 319, 9-10.

in its traditional areas of use and of extending its current areas of use'.³²⁹ Other policies include requiring a certain level of proficiency in Euskara as a condition of employment in BAC institutions³³⁰ and promoting a range of services in Euskara.³³¹

5.8.3 *Relevance of the models to Turkey*

Ideally, a system of MTE in Turkey will combine elements of non-territorial models and territorial models. The preservation and development of the Kurdish language in Turkey requires some form of management and control of education exercised by Turkey's Kurds, or in other words some form of autonomy or self-determination. Given that so many Kurds live outside of the mostly Kurdish regions of the South-east, it will be necessary to implement a model that can practically accommodate that dispersed population. Here, the models accommodating Canada's dispersed Francophone communities could be helpful. At the same time, the mostly Kurdish regions need space to design and implement policies aimed at preserving and promoting the Kurdish language and reversing its decline in the face of the dominant Turkish language. The Basque model can be helpful here. Furthermore, the fact that more than one dialect of the Kurdish language is used in the mostly Kurdish regions might necessitate a combination of territorial autonomy and non-territorial models. One imagines a Kurdish political entity in southeast Turkey exercising powers over the language of education, combined with a system granting some kind of educational control to the minority of Zaza speaking Kurds wherever their population density is sufficiently high.

As explained earlier in this chapter, MTE is a vitally important aspect of the Kurdish Question in Turkey. But the nature of the conflict between the Turkish State and the bulk of its Kurdish population necessitates something beyond MTE, beyond cultural self-determination, and beyond individual cultural rights. Although the concrete conditions in Turkey and its neighbouring States indicate that Kurdish *political* autonomy will be a very difficult thing to achieve, it is arguably a necessary ingredient of any lasting solution to the Kurdish Question. The next chapter will therefore discuss aspects of political participation.

³²⁹ *Ibid*, 10.

³³⁰ *Ibid*, 14.

³³¹ *Ibid*, 16.

5.9 Conclusion

In conclusion, it is quite widely recognised that the claim to be educated in the Kurdish language is one of the core aspects—if not *the* core aspect—of the Kurdish Question in Turkey. As Chapter Two detailed, the right of self-determination represented the universal triumph of the nation-state form, and one of the most marked tendencies of nation-states is their felt need to create a single nation unified around a single language. Such was the case after the French Revolution, and such is the case in Turkey—a relatively new nation-state—to this day. Historically, Kurdish speakers in Turkey have seen their language banned (overtly and covertly) across a whole range of spheres, including in the media, in politics, in geography, and in schools. Under the ruling AKP, Turkey made significant progress in terms of Kurdish language rights (before backsliding in recent years due to the ruling party's authoritarian turn). But very little progress has been made in terms of Kurdish language education, which is one of the most important ways of ensuring the survival and development of minority languages.

The Kurdish demand for MTE cuts across several human rights categories. It engages the right of self-determination in its *participatory* and *remedial* dimensions, since a lack of MTE leads to a severe lack of participation in cultural as well as in political, economic, and social life. This marginalisation is bound-up with the way in which international law allocates and legitimises the use of sovereignty. It also engages general non-discrimination rights, minority rights, and children's rights. It cannot be concluded that these human rights standards—in isolation or in tandem—entail a *right* to MTE, but it can be concluded without hesitation that they provide *strong normative support* to the claim for MTE. To be precise, the fact that Kurds have a very long historical presence in Turkey, the fact that they are (partly) territorially concentrated, and the fact that they suffer from severe and various forms of oppression based on their language, helps to build the case that MTE ought to be provided in order to fully realise the human rights of Turkey's Kurds.

MTE could be made available in a number of ways. This chapter has argued that given Kurds' settlement patterns, being partly territorially concentrated and partly dispersed, it is desirable to implement some kind of non-territorial autonomy. The Canadian model, which allows the Francophone linguistic minority to control its own schools where numbers warrant, is one model that might be suitable for adoption (with the necessary modifications) by Turkey. At the

same time, evidence suggests that territorial autonomy arrangements which effectively grant to minority groups the power to pull policy levers in order to maintain and develop their language can be useful. In the Basque Region, for example, a well-designed system of MTE forms but one aspect of a broader array of minority language policies which have been quite effective in reviving a language on the verge of extinction. An ideal model in Turkey would combine both the Basque and the Canadian models.

Through these technically straightforward expedients, a great deal of tension between Kurds and the Turkish state could be relieved. But the language issue is not the only aspect of the Kurdish Question which demands urgent attention. The next chapters will consider Kurdish political participation at both the national and local levels.

CHAPTER SIX

6 Political Participation I: The National Level

The next two chapters will explore another important aspect of the Kurdish Question in Turkey, namely Kurdish political participation in political institutions at both the national and local levels. This chapter will explore two key issues pertaining to political participation at the national level, namely Turkey's electoral threshold and the militant aspects of its democracy, which will be set against international and regional human rights standards. Chapter Seven will then shift the focus from the national to the local level by examining the place of territorial autonomy within international human rights law.

This chapter will begin by considering the historical oppression of pro-Kurdish political parties in Turkey. This history of oppression is bound-up with Turkey's nation-building project, which insists on a monist understanding of the nation and its unity and views legitimate Kurdish political demands as a threat to that understanding. Kurdish political demands have therefore been considered beyond the pale and legal mechanisms have been implemented in order to keep pro-Kurdish parties out of the national parliament. Having recounted this historical oppression, the chapter will go on to consider how the claim to political participation at the national level—particularly via the removal or reform of obstacles thereto—interfaces with the right of self-determination and with some interlocking individual human rights standards.

6.1 Kurdish political participation in the Republic of Turkey: a brief historical overview

Turkey has been a democracy, in the “thin” sense of holding regular competitive elections, since 1950; which gives Turkey a longer democratic record than Spain, Portugal and Greece.¹ Its electoral system is based on a form of proportional representation which, in theory, makes it easier for parties representing minorities to get elected to parliament. In its 2011 report on ending the PKK insurgency, *International Crisis Group* noted that in the past decades roughly one-sixth of seats in the Turkish parliament have been occupied by Kurmanji or Zazaki

¹ Perry Anderson, *The New Old World* (Verso 2009), 431.

speakers, which is roughly in-line with the proportion of Kurds in Turkey's population.² Barkey and Fuller note that Kurds have had "a remarkable success in getting themselves elected or represented in mainstream Turkish parties"³ and they have been present in them ever since the foundation of the Republic.⁴ This might lead one to wonder why political participation is a core aspect of the Kurdish Question in Turkey. After all, the fact of being Kurdish or having Kurdish roots does not appear to have ever been a barrier to political participation in the Turkish national parliament. So wherein lies the problem? This brief historical overview begins to answer that question by identifying the severe limits that have been placed upon national Kurdish political participation in Turkey.

From early on, Turkey's political parties sought to integrate Kurds into their ranks for a number of reasons. Kurdish tribal leaders, for example, would perform important services for the parties by delivering large blocks of Kurdish votes⁵ in return for favours, the provision of certain services, and the validation of their preeminence.⁶ Throughout the 1940s and 1950s, Kurdish politicians did not openly challenge state policies in the Kurdistan region⁷ and the state addressed the Kurdish Question as a matter of reactionary politics and backwardness rather than as an ethno-political question.⁸

Turkey's first coup in 1960 overturned the authoritarian majoritarian system established by the ruling Democrat Party of Adnan Menderes and introduced certain checks and balances, including a Constitutional Court and constitutionally guaranteed rights. It also provided scope for a broader range of political parties to become established. But it also planted the seeds of a tutelary democracy by granting the military and the judiciary a powerful role in politics.⁹ In the ensuing two decades Kurdish politicians began to challenge the status quo in the Kurdistan region, primarily through left-wing political parties. By far the most important left-wing party

² International Crisis Group, *Turkey: Ending the PKK Insurgency* (20 September 2011)

<<https://d2071andvip0wj.cloudfront.net/213-turkey-ending-the-pkk-insurgency.pdf>> accessed 04/09/18, 19.

³ Henri Barkey & Graham E. Fuller, *Turkey's Kurdish Question* (Rowman and Littlefield 1998), 74.

⁴ Henri Barkey, 'The people's democracy party (hadepe): the travails of a legal Kurdish party in Turkey' 18 *Journal of Muslim Minority Affairs* (1998), 129.

⁵ Hamit Bozarslan, 'Political Crisis and Kurdish Issue in Turkey' in Robert Olson (ed.), *The Kurdish Nationalist Movement and its Impact on the Middle East in the 1990s* (Lexington 1996), 135.

⁶ Henri Barkey, *supra* n. 3, p. 74.

⁷ Nicole Watts, *Activists in Office: Kurdish Politics and Protest in Turkey* (University of Washington 2010), 26.

⁸ Fuat Keyman & Sebnem Gumuscu, *Democracy, Identity and Foreign Policy in Turkey: Hegemony Through Transformation* (Palgrave Macmillan 2014), 99-100.

⁹ Ergun Özbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave Macmillan 2011), 9-14.

to incorporate Kurds was the Workers' Party of Turkey (TIP), which argued for a parliamentary route to socialism and won almost three per cent of the national vote in the 1965 general election with significant support from Kurdish areas.¹⁰ Four of TIP's fifteen MPs were Kurdish and it was the first party to acknowledge Kurdish ethnic identity in Turkey. At first, TIP was loathe to address the Kurdish Question. Indeed there was a marked difference in terms of priorities between some of its Turkish members and its Kurdish members. The former wished to prioritise the achievement of socialism (under which rights would be extended to Kurds) and the latter wished to prioritise the Kurdish Question.¹¹ Under pressure, TIP resolved in its 1970 congress that it was a "requisite revolutionary duty of our party. . . to support the struggle of the Kurdish people, to make use of its constitutional citizenship rights and to realise all of its other democratic desires and hopes".¹² TIP's legislative impact was limited and its stance on the Kurdish Question was one of the causes of its closure after the 1971 coup, with the Constitutional Court finding that it had supported separatism. Although it re-opened in 1975, it never recovered its former strength and was permanently closed after the 1980 coup.¹³ The 1960s also saw the birth of the first specifically Kurdish party, the Democratic Party of Turkish Kurdistan (KDPT). The party was the cousin of Mulla Mustafa Barzani's Iraqi Kurdish KDP and lived an underground existence in Turkey, where Kurdish parties were illegal. For a number of reasons, including the assassination of its founding secretary and its conservative ideology, it failed to set-down roots and soon disappeared.¹⁴

During the 1960s Kurdish political participation at the national level was therefore tightly interwoven with revolutionary politics which aimed at a single socialist State and was primarily addressed as an issue of material underdevelopment.¹⁵ At the same time, Kurdish tribal leaders continued to be the major force in Kurdish political life, delivering votes to the main political parties.¹⁶ The 1970s, in contrast, witnessed a growing split between socialist and Kurdish political agendas and an increasing emphasis on the ethnic dimensions of the Kurdish

¹⁰ Cengiz Gunes, 'Turkey's New Left', 107 *New Left Review* (2017), 10.

¹¹ Nicole Watts, *supra* n. 7, 39-40.

¹² Erkan Dogan, 'Parliamentary Experience of the Turkish Labor Party: 1965-1969', 11 *Turkish Studies* (2010), 316.

¹³ *Ibid*, 727.

¹⁴ David McDowall, *A Modern History of the Kurds* (I.B. Tauris, 2004), 408.

¹⁵ Fuat Keyman & Sebnem Gumuscu, *supra* n. 11, p. 100.

¹⁶ Hamit Bozarslan, 'Kurds and the Turkish State' in Resat Kasaba (ed), *The Cambridge History of Turkey* (CUP 2008), 346.

Question.¹⁷ This was partly attributable to dissatisfaction with the Turkish left's limited engagement with the Kurdish cause¹⁸ and partly attributable to the state's recalcitrant and repressive response to moderate Kurdish demands.¹⁹ External factors, including events in Iraqi Kurdistan under Saddam Hussein, also played an important role. Against that background, Kurdish activists began to intensify their focus on extra-parliamentary activities.²⁰ Kurdish leftists established underground parties such as the clandestine Socialist Party of Kurdistan.²¹ At the same time, there was a growing emphasis on local political participation with the election of pro-Kurdish mayors in Diyarbakir, Urfa and Batman.²² This was made possible by constitutional changes that transformed the mayoralty into an elected position.²³

The most important Kurdish organisation established in the 1970s was undoubtedly the Kurdistan Workers Party (PKK), officially launched by Abdullah Öcalan in 1978. Its rise must be understood in the context of the arrest and torture of Kurdish activists and intellectuals, the repression of manifestations of Kurdishness, the closure of parliamentary avenues of political participation, and the violent crackdown on leftists sponsored, or at least tolerated, by the State in the lead up to the coup of 1980.²⁴ Indeed, Öcalan's prison experiences in 1972 are said to have gone a long way towards convincing him that democratic political participation was a dead-end and that becoming a "professional revolutionary" was the only answer.²⁵ The PKK's founding ideology was an authoritarian mix of Marxism-Leninism²⁶ and Kurdish nationalism.²⁷ In its founding declaration, it asserted that it was the new organization of the Kurdish proletariat and characterised its struggle as one of national liberation against foreign domination.²⁸ Its ultimate aim was, at that time, the creation of an independent Kurdish State in the Kurdish areas of Turkey, Iraq, Iran and Syria. It was opposed to both the Turkish

¹⁷ Nicole Watts, *supra* n. 7, 41-42.

¹⁸ Henri Barkey, 'The Transformation of Turkey's Kurdish Question' in Gareth Stansfield and Mohammed Shareef (eds), *The Kurdish Question Revisited* (Hurst 2017), 214.

¹⁹ Hamit Bozarslan, *supra* n. 16.

²⁰ *Ibid*, 347-348.

²¹ David McDowall, *supra* n. 13, 414.

²² Nicole Watts, *supra* n. 7, 46.

²³ Charlotte Joppien, *Municipal Politics in Turkey: Local Government and Party Organisation* (Routledge 2017), ch. 4.

²⁴ See Halil Karaveli, *Why Turkey is Authoritarian: From Atatürk to Erdogan* (Pluto 2018), ch. 6.

²⁵ Aliza Marcus, *Blood and Belief: The PKK and the Kurdish Fight for Independence* (NYU Press 2007), 23-25.

²⁶ *Ibid*, 41.

²⁷ Paul White, *The PKK: Coming Down from the Mountains* (Zed 2015), 29.

²⁸ *Ibid*.

government and the tribal Kurdish elements who supported it.²⁹ Its aims were to be achieved via a “people’s war” to overthrow Turkish rule.³⁰

At the beginning of the 1980s Kurdish political participation was divided between three camps. The majority of politicians continued to participate in the mainstream parties and, for the most part, did not actively seek to tackle the Kurdish Question.³¹ The second camp consisted of followers of groups such as the Socialist Party of Kurdistan. This group more actively asserted its Kurdish identity and managed to obtain a measure of local power in major Kurdish cities like Diyarbakir. The third camp consisted of armed groups like the PKK.³²

The 1980 coup brought to power a military junta bent on collapsing the freedoms established after the 1961 coup, destroying the Turkish and Kurdish left (and the extreme right, which had until then been tolerated), imposing a neoliberal economic order, and injecting a dose of Islam into Turkish public life (the latter two goals went hand-in-hand).³³ In the aftermath of the intervention the old political parties were dissolved and their possessions confiscated.³⁴ Mass arrests and torture followed, as did the severe repression of all dissent—a hostile environment that played a major role in strengthening the PKK as an anti-systemic political actor.³⁵ A new constitution was drafted which, in the words of Ozbudun, sought to “protect the state and its authority against its citizens rather than to safeguard individuals against the encroachments of state authority”.³⁶ The new authoritarian and tutelary constitution, alongside other laws of a constitutional nature, placed severe restrictions on Kurdish political participation. These restrictions took the form of, *inter alia*, limits to the scope of legitimate political activity and barriers to parliamentary representation. The Law on Political Parties (Law 2820), for example, provides that political parties cannot “uphold the aim of changing the principle of the unity of the State...” (Section 80) and Article 68 of the constitution bans parties from advocating anything contrary to the territorial integrity and political independence of the state. The

²⁹ Michael Gunter, ‘The Kurdish Problem in Turkey’, 42 *Middle East Journal* (1988), 394-395.

³⁰ Cengis Gunes, ‘Mobilization of the Kurds in Turkey During the 1980s and 1990s’ in Gareth Stansfield and Mohammed Shareef, *The Kurdish Question Revisited* (Hurst, 2017), p. 189.

³¹ Hamit Bozarslan, *supra* n. 16, 349.

³² *Ibid.*

³³ Halil Karaveli, *supra* n. 24, 186.

³⁴ Erik Zürcher, *Turkey: A Modern History* (I.B. Tauris 2017), 284.

³⁵ Cengis Gunes, ‘Political reconciliation in Turkey: challenges and prospects’ in Cengis Gunes and Welat Zeydanlioglu (eds), *The Kurdish Question in Turkey: New Perspectives on Violence, Representation and Reconciliation* (Taylor & Francis 2013), 265.

³⁶ Ergun Ozbudun, *supra* n. 9, 19.

Constitutional Court interpreted this as a legal ban on the *advocacy* of autonomy or self-rule for regions, even though this is theoretically compatible with both territorial integrity and the unitary state form.³⁷ Article 81 of Law 2820 banned political parties from “creating minorities... by means of preserving, developing or spreading languages and cultures other than the Turkish language and culture”. In terms of barriers to parliamentary representation, Law 2839 establishes an electoral threshold which requires political parties to obtain at least 10 per cent of the national vote in order to enter parliament, the original aim being to encourage voters to support two or three main parties, and to discourage them from voting for small left-wing and extreme right-wing parties.³⁸

In the mid-1980s the PKK’s violent insurgency began. At about the same time, the first explicitly pro-Kurdish political parties began to emerge. The first party, HEP, came from within the mainstream Social Democratic Populist Party (SHP), which contained a number of Kurdish representatives and had been relatively open to discussing Kurdish nationalist demands.³⁹ A number of its Kurdish representatives attended a Paris conference on the Kurdish Question in 1989 and were subsequently expelled from the party. Others resigned in protest and later formed the nucleus of HEP.⁴⁰ HEP obtained representation in parliament via an alliance with the SHP in the 1991 snap election, becoming the first pro-Kurdish party on the national stage. It was shuttered by the Constitutional Court in July 1993 for activities that were “likely to undermine the territorial integrity of the State and the unity of the nation”. But HEP was the first in a long line of pro-Kurdish parties that shared the same broad agenda, namely Kurdish identity politics combined with left-wing ideas and policies.⁴¹ As one pro-Kurdish party was closed-down, another would appear in its place as members took to establishing backup parties in advance. These parties have been competitive in the Kurdistan region of Turkey, and have been able to build-up a solid base of regional support there even though the

³⁷ Ergun Ozbudun, ‘Party prohibition cases: different approaches by the Turkish constitutional court and the European Court of Human Rights’, 17 *Democratization* (2010), 128.

³⁸ Ersin Kalaycioglu, *Turkish Dynamics: Bridge Across Troubled Lands* (Palgrave Macmillan 2005), 134.

³⁹ Francis O’Connor, *The Kurdish Movement in Turkey: Between Political Differentiation and Violent Confrontation* (Peace Research Institute Frankfurt 2017), 9.

⁴⁰ Henri Barkey, ‘The People’s Democracy Party (HADEP): The Treavils of a Legal Kurdish Party in Turkey’, 18 *Journal of Muslim Minority Affairs* (1998), 130.

⁴¹ Ödül Celep, ‘The moderation of Turkey’s Kurdish left: the Peoples’ Democratic Party (HDP)’, 19 *Turkish Studies* (2018), 728.

majority of Kurdish voters have historically tended to vote for religiously conservative parties.⁴²

According to Bayir's analysis of the party closure cases, the Constitutional Court mainly closed pro-Kurdish parties down on four grounds: asserting the existence of minorities based on race and language; promoting non-Turkish languages and cultures; impairing the unitary state principle and the state's territorial integrity; and reinforcing the idea of race.⁴³ In Kogacioglu's analysis, the Constitutional Court deployed the concepts of *progress*, *unity*, and *democracy* – where each concept is the condition of the realisation of the other – in order to shut-down Kurdish nationalist claims. Within this conceptual framework, any perceived threat to the state's unity was automatically a threat to democracy, which made the decision to ban pro-Kurdish parties a straightforward defence of Turkey's democratic system.⁴⁴ In this way, Turkey's tutelary Constitutional Court did its job in rigidly defending and upholding the state's official ideology, which essentially conceives of the nation in monist terms: there is only one nation (which is harnessed to the dominant Turkish *ethnie*) with one language. Turkey was thus both a tutelary democracy and a “militant democracy”, defined as “a form of constitutional democracy authorised to protect civil and political freedom by preemptively restricting its exercise”.⁴⁵ One might legitimately add the adjective *paranoid* militant democracy, given that that Constitutional Court has been incapable of seeing Kurdish demands through anything other than a monochrome lens. Viewed through this lens, the Court was always faced with a simple choice between Turkish unity (democracy) and Kurdish separatism (non-democracy) with no room for nuance.⁴⁶ Although the institutional character of the Turkish judiciary (namely its role as a Kemalist check on right-wing Islamist governments) has changed since the beginning of AKP hegemony in 2002⁴⁷, it has maintained this fundamentally hostile view of Kurdish demands.⁴⁸

⁴² Matthew Kocher, 'The Decline of PKK and the Viability of a One-State Solution in Turkey' in Matthias Koenig and Paul de Guchteneire (eds), *Democracy and Human Rights in Multicultural Societies* (UNESCO 2007).

⁴³ Derya Bayir, *Minorities and Nationalism in Turkish Law* (Routledge 2013), 191.

⁴⁴ Dicle Kogacioglu, 'Progress, Unity, and Democracy: Dissolving Political Parties in Turkey', 38 *Law & Society Review* (2004), 453.

⁴⁵ Kathleen Cavanaugh and Edel Hughes, 'Rethinking What is Necessary in a Democratic Society: Militant Democracy and the Turkish State', 38 *Human Rights Quarterly* (2016), 624-625.

⁴⁶ Ödul Celep, 'The Political Causes of Party Closures in Turkey', 67 *Parliamentary Affairs* (2014), 382-383.

⁴⁷ For background, see Fuat Keyman and Sebnem Gumuscu, *supra* n. 8, ch. 4.

⁴⁸ Ödul Celep, *supra* n. 46, 388.

The formal mechanism of party closures has not, however, been the only obstacle faced by pro-Kurdish parties. Watts notes that they have long been coerced through a mixture of legal and extra-legal measures aimed at both the parties and their individual members.⁴⁹ These have included lengthy detentions without trial, bans on political activity, prison sentences under broad anti-terror laws, and physical attacks and intimidation.⁵⁰

Pro-Kurdish parties have had to struggle against at least two major barriers to political participation at the national level. First, actually entering parliament as a party requires maneuvers to bypass or overcome Turkey's exceptionally high electoral threshold, which stands at 10 per cent of the overall vote. Second, once they were in parliament the scope of their activities was (and still is) heavily policed by Turkey's tutelary institutions. Thus, having been excluded from the process of state formation after World War I, pro-Kurdish political claims have been viewed by the state and its institutions through the lens of a dominant state ideology which delegitimises and excludes them. The ongoing nation-building project in Turkey sees strict unity, monoculturalism and monolingualism as vital desiderata, and any perceived attempt to even *articulate* a demand that might question one of these desiderata has been placed outside the bounds of legitimate political participation.

At this stage it is necessary to break away from the discussion of Kurdish political participation in general historical terms, and to shift our focus in the next section to the two barriers to participation identified above, namely the electoral threshold and the militant character of Turkish democracy. But before moving on, it is now possible to venture an answer to the question posed at the beginning of this section. Given that being Kurdish or having Kurdish roots does not appear to have ever been a barrier to political participation in the Turkish national parliament, why is political participation a major aspect of the Kurdish Question? The answer requires one to make a distinction between being Kurdish on the one hand and advocating Kurdish political demands on the other. Turkey has had few problems assimilating Kurds into its political parties, but it has had serious problems assimilating *pro-Kurdish parties* into its political system. As Bayir puts it the problem is not Kurds as an ethnic group *per se*,

⁴⁹ Nicole Watts, *supra* n. 7, ch. 4.

⁵⁰ *Ibid.*

rather the problem is *Kurdism*, which claims the separate existence of a Kurdish people and articulates cultural, linguistic and national demands.⁵¹

6.2 *Militant democracy, the electoral threshold and the right of self-determination*

As detailed above, Turkey's electoral threshold and the paranoid militant aspects of its democracy are bound-up with the state's ongoing nation-building project, which seeks to forge a single nation harnessed to the dominant Turkish *ethnie*. They have the effect of making it difficult for political parties with a focus on Kurdish demands to enter parliament, and of preventing them from advocating those demands if they do. In this subsection, I argue that all three dimensions of internal self-determination are engaged by these exclusionary mechanisms.

6.2.1 *The participatory argument*

As an instrument for minority political participation, political parties with a focus on the demands of minority groups are an important feature of internal self-determination. It is often through such parties that minority groups are best able to influence decision making at the national level and to have their voices heard, particularly in circumstances where the minority group has values and interests which differ sharply from those of the political mainstream. In such cases, it is all the more important for members of minority groups to have a political outlet which is, to a degree, separate from the dominant mainstream and which is capable of articulating challenges to it. In Turkey, the two dominant political parties—namely the AKP and the secularist CHP—have been, on the whole and in the main, strikingly opposed to legitimate Kurdish claims. This makes the presence and the functioning of pro-Kurdish parties vitally important for Kurdish self-determination.

In essence, the argument is that in order to be able to participate more effectively in the political life of the state, Turkey's Kurds need to be given the option of supporting a challenger political party which brings their distinctive values and interests to the national political discussion. The

⁵¹ Derya Bayir, 'The role of the judicial system in the politicized of the Kurdish opposition' in Cengiz Gunes and Welat Zeydanlioglu, *The Kurdish Question in Turkey: New Perspectives on Violence, Representation and Reconciliation* (Routledge 2013), 26.

reform of Turkey's electoral threshold (by either lowering it or removing it) is therefore—at a minimum—highly desirable from a self-determination perspective because it would smooth the path to pro-Kurdish representation in parliament. Furthermore, the removal of barriers to such parties' contribution to national debates would allow the freer articulation of Kurdish standpoints of matters of national and local concern. It is, indeed, difficult to maintain that Turkey's Kurds are able to participate in the political life of the state when they are only allowed do so within a very narrow spectrum of acceptable opinion.

6.2.2 The remedial argument

As explained above, the exclusion of political parties with a broadly pro-Kurdish agenda is one of the pathologies which has arisen from international law's allocation of sovereignty to Turkey and its failure to allocate it to Kurdistan. The nation-building project that followed the creation of the Turkish state insists upon uniformity in culture and language, and tends to view particularised Kurdish demands as threats to unity, progress and democracy. The electoral threshold and the militant aspects of Turkey's democracy are two weapons which are deployed in service of that nation-building project. These pathologies can be offset by reforming the electoral threshold and by allowing the freer articulation of Kurdish standpoints in parliament. Furthermore, allowing for the political participation of pro-Kurdish parties in parliament is one important way of mitigating the other pathologies that have arisen in Turkey, such as the oppression of the Kurdish language which was detailed in the previous chapter. The freedom to bring such oppression to the attention of the national parliament and to argue for mechanisms to prevent it must be part of the remedy.

6.2.3 The processual argument

As well as being an important ongoing mechanism of Kurdish political participation at the national level, the presence and free operation of pro-Kurdish parties in the national parliament is also a valuable tool for negotiating other, "thicker" forms of political participation, such as territorial autonomy. As the legitimate representatives of a substantial number of Turkey's Kurds, and having (as the next chapter on territorial autonomy explains) won democratic mandates based on manifesto pledges to negotiate such solutions to the Kurdish Question, pro-

Kurdish parties are well placed to articulate those claims and to negotiate them with state representatives. To prevent legitimate interlocutors from taking their seats in parliament and to prevent them from articulating those self-determination claims is to fail to take legitimate Kurdish demands seriously—is, indeed, to mark them out as unacceptable and beyond the pale.

The argument here is that pro-Kurdish political parties are the legitimate representatives of a substantial strand of Kurdish opinion, and that they are therefore an important part of the *process* towards negotiating a solution to the Kurdish Question which will involve other, supplementary forms of political participation. From a processual standpoint then, the electoral threshold and the paranoid militant aspects of Turkey's democracy ought to be changed.

6.3 Militant democracy, the electoral threshold and individual rights

This section will examine Turkey's party-closure cases and its electoral threshold from the perspective of individual rights. Both issues have been considered by a range of institutions at the European and the international levels. Together, the work of these institutions helps to elaborate the ways in which individual human rights standards interface with Kurdish claims to political participation at the national level.

6.3.1 The European Convention on Human Rights

To begin with the militant features of Turkey's democracy, the frequent political party closure cases have been engaged with most prominently by Council of Europe institutions such as the European Court of Human Rights and the Venice Commission. They have yielded an important body of case law within the ECHR system concerning the type of democracy it seeks to protect, and the scope of that protection. Whereas the early post-war case law of the ECtHR was concerned with drawing a sharp distinction between democracy and totalitarianism⁵², the Court's interaction with Turkey's militant democracy provided the occasion for it to develop a

⁵² Susan Marks, 'The European Convention on Human Rights and its 'Democratic Society'', 66 *British Yearbook of International Law* (1996).

clear preference for a multiparty liberal version of democracy.⁵³ In *United Communist Party of Turkey and Others v. Turkey*, the United Communist Party was closed down on the grounds that certain of its proposals were intended to create minorities to the detriment of the unity of the Turkish nation. The party's programme had contained passages recognising the existence of Kurds and of a Kurdish problem, and had advocated a peaceful, democratic and fair solution to that problem.⁵⁴ The major claim discussed in the case was brought under Article 11 of the ECHR (freedom of assembly and association). In its judgment upholding the complaint, the Court noted that democracy "appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it"⁵⁵ and that the participation of a plurality of political parties, representing different shades of opinion, is an essential condition of democracy.⁵⁶ The Court rejected Turkey's submission that Article 11 was not applicable to political parties and, to the contrary, argued that the exceptions contained in Article 11(2) ought to be construed strictly when the association under discussion is a political party.⁵⁷ According to the Court, a political party cannot be hindered "solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned".⁵⁸ In *Socialist Party of Turkey v. Turkey* the Court added that proposing to restructure the Turkish constitution along federal lines is not incompatible with the rules of democracy.⁵⁹ In *HADEP and Demir v. Turkey* the Court reiterated that a political party may campaign for a change in the constitutional structure of the state on two conditions: it must use and advocate legal and democratic means to achieve its goals (which precludes calls to violence⁶⁰) and it must propose a change that is compatible with fundamental democratic principles.⁶¹

⁵³ Jure Vidmar, 'Multiparty Democracy: International and European Human Rights Law Perspectives', 23 *Leiden Journal of International Law* (2010), 227.

⁵⁴ ECHR, *Case of United Communist Party of Turkey and Others v. Turkey* (1998) (Application no. 133/1996/752/951), para. 9.

⁵⁵ *Ibid* para. 45.

⁵⁶ *Ibid*, para. 44.

⁵⁷ *Ibid*, para. 46.

⁵⁸ *Ibid*, para. 57.

⁵⁹ ECHR, *Case of Socialist Party of Turkey v. Others* (1998) (Application no. 20/1997/804/1007), para. 47.

⁶⁰ See ECHR, *Case of Herri Batasuna and Batasuna v. Spain* (2009) (Application no. 25803/04).

⁶¹ ECHR, *Case of HADEP and Demir v. Turkey* (2010) (Application no. 28003/03), para. 61. Also see ECHR, *Case of Refah Partisi (the Welfare Party) and Others v. Turkey* (2003) (Application no. 41340/98).

These cases clearly articulate legally binding minimum standards.⁶² Through them, the ECtHR has unpacked Turkey's epistemological bundle of unity and democracy by making it clear that pro-Kurdish parties cannot legally be closed down simply for advocating federalism or territorial autonomy as part of a solution to the Kurdish Question. As the Venice Commission explains, the closure of a political party merely because it seeks to change the existing constitutional order has no place in a liberal and democratic State.⁶³ Far from being a legitimate action pursued in defence of its democracy, the closure of political parties in Turkey has long been regarded as a problem in the light of democratic standards maintained in Turkey's fellow Council of Europe states.⁶⁴ On the whole, these cases and opinions make it clear that the transformation of a centralised unitary State into a decentralised State with territorial autonomy arrangements is not *per se* incompatible with the requirements of a democratic society. They also carve-out a sphere of negative freedom for political parties representing the interests of minorities to articulate self-determination claims, provided those claims do not advocate the use of violence or propose an undemocratic constitutional change.

So much for human rights' protection of pro-Kurdish political parties from closure. The next important question, which will be examined through the lens of Turkey's electoral threshold, is: to what extent are states required to facilitate the participation of minority political parties at the national level via adjustments to their electoral systems? But before considering the applicable legal standards at the regional level, it is necessary to provide a brief overview of Turkey's electoral threshold and how it tends to work in practice.

As noted above, Turkey's electoral threshold was introduced after the 1980 military coup in order to encourage voters to support two or three main parties, and to discourage them from voting for small left-wing and extreme right-wing parties.⁶⁵ It bars candidates of a political party which has not obtained more than 10 per cent of all the valid votes in Turkey as a whole from entering parliament. If a party fails to meet this requirement then its votes are redistributed

⁶² Significantly higher standards are articulated by the Venice Commission, based upon common democratic European practice. See Council of Europe Commission for Democracy Through Law, *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey* (2009) (Opinion No. 489/2008).

⁶³ Council of Europe Commission for Democracy Through Law, *Guidelines on Prohibition and Dissolution of Political Parties and Analogous Measures* (2000), p. 8.

⁶⁴ Council of Europe Commission for Democracy Through Law, *Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey* (2009) (Opinion No. 489/2008), para. 97.

⁶⁵ Ersin Kalaycioglu, *supra* n. 65, 134.

to the biggest party in that electoral district which *has* crossed the line.⁶⁶ The threshold, which is rooted in Section 33 of Law 2839 (1983), has been described as “the most important handicap to [pro-Kurdish] political participation at the national assembly level...”⁶⁷. It has historically served to exclude pro-Kurdish parties from representation in parliament or to force their candidates to engage in various strategic gambits, each of which has its own serious drawbacks, in order to enter parliament.

The result of Turkey’s 2002 general election, in which only two out of eighteen political parties were able to surpass the threshold, provides a striking illustration of its capacity to disenfranchise large swathes of voters from the Kurdish provinces and beyond. In 2002, the AKP won 34.26% of the national vote but fully 66% of the seats in parliament. The CHP won 19.4% of the national vote but 33% of the seats in parliament. Several other parties, which collectively represented around 45% of the national vote, did not win a single seat.⁶⁸ In the mostly Kurdish province of Diyarbakir, the pro-Kurdish DEHAP won 56.1% of the vote but none of the province’s parliamentary seats because it only managed to poll 6.2% nationally. Meanwhile, the AKP won only 16% of Diyarbakir’s votes but eight of its parliamentary seats. The electoral threshold was therefore very effective in excluding pro-Kurdish parties from political participation at the national level. Their relatively strong electoral base in the mostly Kurdish provinces could not be translated into political participation at the national level.

Pro-Kurdish parties have, in the past, deployed various gambits to circumvent the electoral threshold. These tactical moves involved running as independent candidates and running on another political party’s list. In the 2007 general election, for example, the pro-Kurdish DTP was able to secure 22 seats in parliament despite the fact that it only polled 4.6% nationally. This was achieved by running candidates as independents (to whom the electoral threshold does not apply) and then establishing a parliamentary group among the elected independent candidates.⁶⁹ Another tactical gambit involves candidates from the pro-Kurdish party

⁶⁶ Francis O’Connor and Bahar Baser, ‘Communal violence and ethnic polarization before and after the 2015 elections in Turkey: attacks against the HDP and the Kurdish population’, *Southeast European and Black Sea Studies* (2018), 8.

⁶⁷ Büsra Ersanli and Günay Özdoğan, ‘Obstacles and opportunities: recent Kurdish struggles for political representation and participation in Turkey’, 35 *Southeastern Europe* (2011), 73.

⁶⁸ Sinan Alkin, ‘Underrepresentative Democracy: Why Turkey Should Abandon Europe’s Highest Electoral Threshold’, 10 *Washington University Global Studies Law Review* (2011), 354.

⁶⁹ Rabia Polat, ‘The 2007 Parliamentary Elections in Turkey: Between Securitisation and Desecuritisation’, 62 *Parliamentary Affairs* (2009).

temporarily dissolving into another party that *is* able to cross the threshold. In 1991, for example, pro-Kurdish HEP candidates ran on the SHP's ticket and thereby secured the parliamentary representation of 22 HEP deputies.⁷⁰ The mechanism of securing parliamentary representation by forming an alliance with another, bigger party was enhanced prior to the 2018 general election. Under the 2018 amendments to the electoral law, political parties are permitted to formally construct pre-election alliances. The electoral threshold will apply to the alliance as a whole rather than the individual parties within it, making it possible for smaller parties to enter parliament on the coat-tails of larger parties, or for a group of small parties to combine their strength in order to cross the threshold.⁷¹ But all of these gambits come with their own serious shortcomings. Independent candidates must deposit a substantial guarantee, are not entitled to broadcasting time, and cannot have their names printed on the ballot slips supplied at frontier posts and airports.⁷² In order to enter into an alliance, a pro-Kurdish party must make itself useful to the party with which it wishes to form an alliance – a serious barrier to its independence.⁷³ Furthermore, in the most recent 2018 election the pro-Kurdish HDP was the only major political party to be excluded from the opposition electoral alliance – a fact that had much to do with the way in which Turkey's political discourse monstered the party, labelling it a terrorist front of the PKK.⁷⁴ Whatever opportunities the new system of electoral alliances creates in theory, the actual practice reveals a likelihood that it will not (at least in the current nationalistic environment) diminish the obstacles to political participation faced by pro-Kurdish parties.

Electoral thresholds in countries with proportional representation systems are not uncommon - many Council of Europe Member States have them.⁷⁵ Germany, for example, has operated an electoral threshold of five per cent since the first postwar elections of 1949.⁷⁶ But each threshold is different: some come with appropriate mechanisms for securing the representation

⁷⁰ Nicole Watts, *supra* n. 7, 66.

⁷¹ International Crisis Group, *Turkey's Election Reinvigorates Debate over Kurdish Demands*, (June 2018) <<https://www.crisisgroup.org/europe-central-asia/western-europemediterranean/turkey/b88-turkeys-election-reinvigorates-debate-over-kurdish-demands>> accessed 12/09/18.

⁷² ECHR, *Case of Yumak and Sadak v. Turkey* (2008) (Application no. 10226/03), para. 136.

⁷³ ECHR, *Case of Yumak and Sadak v. Turkey* (2008) (Application no. 10226/03), Joint dissenting opinion of Judges Tulkens, Vajic, Jaeger and Sikuta, para. 4.

⁷⁴ Francis O'Connor and Bahar Baser, *supra* n. 66. In the end, the fact that the HDP was ostracized did not prevent it from breaking through the threshold and entering parliament.

⁷⁵ Council of Europe Commission for Democracy Through Law, *Report on Thresholds and Other Features of Electoral Systems which Bar Parties from Access to Parliament (II)* (2010) (Study No. 485/2008), para. 21.

⁷⁶ Greg Taylor, 'The constitutionality of election thresholds in Germany', 15 *International Journal of Constitutional Law* (2017).

of parties with a sufficiently strong local or regional base⁷⁷, others provide exemptions for political parties representing ethnic minorities.⁷⁸ According to a 2010 *Venice Commission* report, Turkey's threshold is the highest among Council of Europe member States.

In terms of the legality of Turkey's electoral threshold, certain binding minimum legal standards have been set-down by the ECtHR in its jurisprudence under Article 3 of Protocol 1, according to which states "undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". In *Mathieu-Mohin and Clerfayt v. Belgium*, the ECtHR's first major case concerning Article 3 of Protocol 1, the Court held that the right requires states to hold democratic elections that do not thwart "the free expression of the opinion of the people in the choice of the legislature", a condition that requires, *inter alia*, the equal treatment of all citizens in the exercise of their right to vote.⁷⁹ But the Court also recognised that states' electoral systems seek to fulfill competing objectives. In particular, they seek to simultaneously "reflect fairly faithfully the opinions of the people" and "channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will".⁸⁰ Therefore, the Convention does not demand that all votes have equal weight or that all candidates have equal chances of electoral victory; nor does it prescribe a particular electoral system.⁸¹ The ECtHR does, however, reserve the right to assess the compatibility of state's electoral systems with Article 3 of Protocol 1 "in the light of the political evolution of the country concerned".⁸² Whatever balance is struck between representativeness and governmental effectiveness, the electoral system must provide for conditions that will ensure the "free expression of the opinion of the people in the choice of the legislature".⁸³ In the later case of *Aziz v. Cyprus*, the Court added that electoral rules "should not be such as to exclude some persons or groups of persons from participating in the political life of the country and, in particular, the choice of the legislature".⁸⁴ Does this mean that states are under an obligation to introduce electoral systems

⁷⁷ Germany, for example, allows parties that win three constituencies to enter the Bundestag even if they fail to secure at least five per cent of votes nationwide, *ibid* p. 735.

⁷⁸ Poland's five per cent threshold, for example, does not apply to political parties representing ethnic minorities. See Victoriano Gonzales, Blanca Marquez, and Adolfo Carmona, 'Electoral System in Poland: Revision and Proposal of Modification Based on Biproporportionality', 51 *Representation* (2015).

⁷⁹ ECHR, *Case of Mathieu-Mohin and Clerfayt v. Belgium*, (1987) (Application No. 9267/81), paras. 52-54.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² *Ibid*, para. 54.

⁸³ *Ibid*.

⁸⁴ ECHR, *Case of Aziz v. Cyprus* (2004) (Application No. 69969/01), para. 28.

that guarantee the participation of political parties representing the interests of minority groups?

The ECtHR's reasoning in the above cases, among others, set the stage for its ruling on the legality of Turkey's electoral threshold in *Yumak and Sadak v. Turkey*. In that case, the ECtHR ruled that Article 3 of Protocol 1 does not entail a positive obligation to adopt an electoral system that *guarantees* parliamentary representation to political parties with a regional base of support, but the Court also ruled that "a problem might arise if the relevant legislation tended to deprive such parties of parliamentary representation".⁸⁵ Based in large part upon the fact that pro-Kurdish parties have, in practice, been able to circumvent the threshold via the gambits outlined above, the Court ruled that Turkey's electoral threshold does not violate Article 3 of Protocol 1. In essence, Turkey's electoral threshold was held to pursue the legitimate aim of strengthening governmental stability and it was decided that the threshold pursued this aim in a manner that did not impair the essence of the claimed right. But the *Yumak and Sadak* case is more interesting than its immediate outcome suggests, for the Court went on to observe that Turkey's electoral threshold "appears excessive" and concurred with other Council of Europe institutions which had criticised the threshold and recommended that it be lowered.⁸⁶ The Court's practice of dismissing the applicants' claim while criticizing the electoral threshold that led to it has been described as a kind of "soft law" judicial approach⁸⁷ and it arguably indicates that Turkey is operating at the outer limits of its margin of appreciation.

Graziadei argues that the Court's decision in *Yumak and Sadak*, alongside its decisions in similar cases, shows that states are under no direct obligation to introduce electoral systems that are mindful of minorities' interests.⁸⁸ Given the wide margin of appreciation afforded to States and the concrete outcomes in cases like *Yumak and Sadak*, this is a justified conclusion. One can hardly doubt that Turkey's electoral threshold, looked at in the context of a highly centralised and nationalistic state, is not particularly mindful of Kurdish interests, yet it is technically in conformity with ECHR standards. But at the same time, the Court was not *totally* inattentive to the importance of Kurdish political participation. After all, a large part of

⁸⁵ ECHR, *Case of Yumak and Sadak v. Turkey* (2008) (Application no. 10226/03), para. 124.

⁸⁶ *Ibid*, para. 147.

⁸⁷ Stefan Graziadei, 'Democracy v Human Rights? The Strasbourg Court and the Challenge of Power Sharing', 12 *European Constitutional Law Review* (2016), p. 61.

⁸⁸ *Ibid*.

the Court's judgment was dedicated to an examination of the various avenues available for pro-Kurdish parties to mitigate some of the thresholds' adverse effects, and its concluding paragraph explicitly makes the ruling contingent upon the presence of "correctives and other guarantees which have limited [the threshold's] effect in practice".⁸⁹ Furthermore, the ECtHR's case-law has long recognized that different electoral systems – all of which might technically be in-line with Article 3 of Protocol 1 - provide greater or lesser opportunities for citizens to freely express their opinions. Electoral setups that *do* pay attention to the situation of minorities are envisaged by the Court as being, in general, better at allowing the people to freely express its opinion.⁹⁰ Still, the Court's judgment has been legitimately criticised for giving too much weight to "governmental effectiveness" and too little weight to representativeness.⁹¹

Whatever the limitations of the ECHR's minimum standards, the Court's "soft law" criticisms of the threshold do at least add weight to other arguments (presented below) that revolve around certain *international* human rights law standards. Furthermore, the Court's overall decision can be viewed as revealing less about the overall desirability of Turkey's electoral threshold from a human rights perspective, and more about the perceived legitimate boundaries of judicial activism.⁹²

6.3.2 *Equal rights to political participation*

International human rights law contains a similar right to political participation. Article 25 of the ICCPR contains a right to take part in public affairs, directly or through freely chosen representatives; to vote and be elected in periodic elections which guarantee "the free expression of the will of the electors"; and to have access to public service. This right is to be guaranteed without any discrimination as mentioned in Article 2. The drafting history of Article 25 of the ICCPR reveals that it was never intended to impose upon states a particular electoral system, rather "its function was to lay down fundamental principles, leaving each country to

⁸⁹ ECHR, *Case of Yumak and Sadak v. Turkey* (2008) (Application no. 10226/03), para. 147.

⁹⁰ ECHR, *Case of Lindsay and Others v. the United Kingdom*, (1979) (Application No. 8364/78).

⁹¹ Olgun Akbulut, 'A Critical Analysis of Current Legal Developments on the Political Participation of Minorities in Turkey', 17 *International Journal on Minority and Group Rights* (2010), pp. 556-559.

⁹² For some reflections on the ECtHR's conservative approach to minority rights issues, see Stephanie Berry, 'The Siren's Call? Exploring the Implications of an Additional Protocol to the European Convention on Human Rights and National Minorities', 23 *International Journal on Minority and Group Rights* (2016), 1.

devise within the framework of its national system its own method of applying them”.⁹³ This is, so far, similar to the right contained in the ECHR. But unlike the ECHR, Article 25 does not *unambiguously* include as one of its fundamental principles a right to multiparty democracy. From a historical perspective, the right was “born into a world where the term ‘democracy’... had become the common property of political systems with little in common beyond that term and rhetoric”.⁹⁴ Many states would have refused to ratify a right that they perceived as requiring them to adopt a liberal-democratic system.⁹⁵ After the Cold War, academic interest in the links between multiparty liberal democracy and international law increased⁹⁶ and there was an uptick in United Nations election monitoring activity⁹⁷, but scholarly opinion on the existence of a right to multiparty democracy remains divided along multiple axes (including the meaning of “democracy” and its status as a right under international law).⁹⁸

The UN Human Rights Committee notes that Article 25 is an integral part of the broader human rights framework, and has particularly strong links with the right of self-determination and various individual rights including freedom of expression, opinion and assembly.⁹⁹ It also reiterates that the right does not seek to impose any particular electoral system, although states’ electoral systems must “guarantee and give effect to the free expression of the will of the electors”.¹⁰⁰ But the HRC’s General Comment on Article 25 notably fails to mention the importance of a plurality of political parties to the right’s realisation – a significant omission, particularly in the light of the fact that the HRC had earlier decided in *Bwalya v. Zambia* that restrictions on political activity beyond the sole official party amounted to “an unreasonable restriction of the right to participate in the conduct of public affairs”.¹⁰¹ Furthermore, in its views adopted under the individual complaints mechanism pursuant to the optional protocol to the ICCPR, the HRC has emphasised the individual nature of the Article 25 right and, despite

⁹³ Henry Steiner, ‘Political Participation as a Human Right’, 77 *Harvard Human Rights Yearbook* (1988), 90.

⁹⁴ *Ibid.*

⁹⁵ Jure Vidmar, *supra* n. 53, 217.

⁹⁶ See T.M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *The American Journal of International Law* (1992).

⁹⁷ Gregory Fox, ‘The Right to Political Participation in International Law’ 17 *Yale Journal of International Law* (1992).

⁹⁸ For a flavour of the debate, compare the arguments of: Hilary Charlesworth, ‘It there a human right to democracy?’ in Cindy Holder and David Reidy (eds), *Human Rights: The Hard Questions* (CUP 2013); Stephen Wheatley, *Democracy, Minorities and International Law* (CUP 2005), ch. 3; and Susan Marks, ‘What has Become of the Emerging Right to Democratic Governance?’, 22 *European Journal of International Law* (2011).

⁹⁹ UNHRC, *General Comment No. 25*, UN Doc. CCPR/C/21/Rev.1/Add.7.

¹⁰⁰ *Ibid.*, para. 21.

¹⁰¹ UNHRC, *Bwalya v. Zambia* (1988) (Application No. 314/1998), para. 6.6.

identifying a link with Article 1 (self-determination), has paid little attention in practice to the importance of group influence in the political participation process.¹⁰² For the HRC, the obligation to secure the right without discrimination means that states are not permitted to introduce distinctions on prohibited grounds between citizens in terms of the right to vote and the right to stand for election.¹⁰³ Thus there is little to suggest that states are obligated to adopt an electoral system that is mindful of minority interests even if they *are* obligated to adopt a multiparty liberal democratic system.

Other international human rights instruments also approach the issue of political participation from a non-discrimination perspective. For example, the International Convention on the Elimination of All Forms of Racial Discrimination provides that everyone, without distinction as to (*inter alia*) ethnic origin, has the right to political participation (Article 5(c)). According to the Committee on the Elimination of All Forms of Racial Discrimination, the obligation applies whenever a state imposes a restriction on the right to political participation “which ostensibly applies to all within its jurisdiction”, and states must ensure that such restrictions do not have the *effect* of discriminating against particular ethnic groups.¹⁰⁴ The right is, in other words, directed towards tackling *indirect* discrimination. Turkey’s electoral threshold is one such universal measure. In its Concluding Observations on the fourth to sixth periodic reports of Turkey, the Committee noted – in language reminiscent of the ECtHR’s judgment in *Yumak and Sadak* - that the ten per cent threshold “constitutes an obstacle to the equitable representation of minority groups in political affairs, in particular in elected bodies” and recommended that Turkey revise the threshold requirement.¹⁰⁵ In the same vein, a report submitted to the UN Human Rights Council by an independent expert on minority issues notes “High electoral thresholds usually have an adverse effect on the ability of minority communities to secure political representation and can constitute indirect discrimination”.¹⁰⁶ It is not clear whether such opinions reflect an outright violation of Article 5(c) on the grounds of indirect discrimination in the provision of political participation rights, or whether they are—like the ECtHR’s judgment—intended to draw attention to the *desirability* of reforming the

¹⁰² See UNHRC, *Diergaardt et al. v. Namibia*, (2000) (Communication No. 760/1997), para. 10.8. For criticism of this aspect of the HRC’s decision see the concurring opinion of Martin Scheinin.

¹⁰³ UNHRC, *General Comment No. 25*, para. 3.

¹⁰⁴ UNCERD, *General Recommendation XX*, para. 2.

¹⁰⁵ UNCERD, *Concluding observations on the combined fourth to sixth periodic reports of Turkey*, UN Doc. CERD/C/TUR/CO/4-6, para. 31.

¹⁰⁶ UN Human Rights Council, *Report of the independent expert on minority issues*, Gay McDougall, (2010) UN Doc. A/HRC/13/23, para. 59.

threshold from a non-discrimination perspective. Either way, there are strong normative grounds for criticizing Turkey's high electoral threshold from the perspective of equal individual rights to political participation.

6.3.3 *Minority rights*

Apart from the right to political participation without discrimination, there are other human rights standards under international law that specifically elaborate upon the right of minorities to political participation. The UN Declaration on the Rights of Minorities notes that persons belonging to minorities have the right to participate *effectively* in public life (Article 2(2)), and the right to participate *effectively* in “decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation” (Article 2(3)). This builds upon the right contained in Article 27 of the ICCPR, which requires “measures to ensure the effective participation of members of minority communities in decisions which affect them”.¹⁰⁷ The emphasis here is on *effectivity* rather than *non-discrimination*. This raises an important question, namely what does the right to *effective* political participation demand of states' political participation mechanisms and does it have anything to say about Turkey's electoral threshold?

In its decisions adopted under the individual complaints mechanism, the HRC has emphasised the importance of consultation processes as a method of ensuring the effective participation of minorities in decisions which affect them. In *Apirana Mahuika v. New Zealand* the HRC noted that New Zealand had acted in conformity with Article 27 when it engaged in a broad consultation process with the Maori before passing legislation that interfered with an essential element of their culture, namely the use and control of fisheries.¹⁰⁸ Similarly, in *Länsman et al. v. Finland* the fact that Finland had consulted with the Sami prior to engaging in quarrying activities that affected reindeer husbandry was sufficient in terms of the Sami's right to effective participation.¹⁰⁹ This line of jurisprudence represents the minimum standard of

¹⁰⁷ UNHRC, *General Comment 23*, UN Doc. HRI/GEN/1/Rev.1, para. 7.

¹⁰⁸ UNHRC, *Apirana Mahuika v. New Zealand* (2000) (Communication No. 547/1993).

¹⁰⁹ UNHRC, *Länsman et al. v. Finland* (1994) (Communication No. 511/1992).

political participation required under Article 27.¹¹⁰ But this minimum standard only applies when decisions are being taken that impact upon the essential elements of a minority group's culture. In relation to other issues, Wheatley argues that "the State is under no obligation to ensure that their interests and preferences are directly represented in decision-making processes"¹¹¹ beyond the more general obligation to ensure the right to political participation without discrimination. However, the right of minorities to effective political participation has been the subject of a considerable number of "soft law" standards which provide some useful guidelines and recommendations on how the right can be more fully developed and realised beyond its quite spare minimum requirements.

The UN Commission on Human Rights' *Commentary* associated with the Declaration on the Rights of Minorities explicitly provides a list of "good practices" associated with the right to effective political participation.¹¹² These good practices, some of which go beyond the bare minimum requirements of effective participation, emphasise the importance of minority representation in legislative bodies¹¹³ and draw states' attention to the importance of a well-designed electoral system to the achievement of such representation.¹¹⁴ In a separate study, Asbjørn Eide notes that in order to secure more effective political participation for minorities, particularly in legislative bodies, states should consider waiving electoral thresholds where minorities are concerned.¹¹⁵ Similarly, the OSCE's Lund Recommendations highlight the importance of the electoral process for facilitating effective minority participation and flag-up the potential of lower electoral thresholds to enhance minority participation.¹¹⁶ The Council of Europe's Advisory Committee also notes that electoral thresholds can have a "potentially negative impact on the participation of national minorities in the electoral process..." and that exemptions from threshold requirements have "proved useful to enhance minority participation

¹¹⁰ See UN Commission on Human Rights, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2005/2, para. 42.

¹¹¹ Stephen Wheatley, *Democracy, Minorities and International Law* (CUP 2009), 153.

¹¹² UN Commission on Human Rights, *supra* n. 110, para. 41.

¹¹³ *Ibid.*, para. 44.

¹¹⁴ *Ibid.*, para. 45.

¹¹⁵ UN Commission on Human Rights, *Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities*, UN Doc. E/CN.4/Sub.2/1993/34/Add.4, para. 17.

¹¹⁶ OSCE, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note* (1999), 8-9.

in elected bodies”.¹¹⁷ The Advisory Committee also notes that while Article 15 of the FCNM requires states to create the conditions necessary for effective minority participation in public affairs that are of *particular importance* to them, individual members of minority groups should also have a say on issues affecting the direction of development of society *as a whole*.¹¹⁸ In that connection, the Advisory Committee notes that the precise requirements of “effective participation” cannot be measured in abstract terms because circumstances vary widely between states and minorities,¹¹⁹ rather the obligation to secure effective minority participation can be met through a variety of different mechanisms (including special parliamentary arrangements), but whatever mechanism is chosen ought to ensure that persons belonging to national minorities are given “real opportunities to influence decision-making, the outcome of which should adequately reflect their needs”.¹²⁰

One can therefore argue that although the right of minorities to effective participation does not entail a clear obligation on Turkey to lower its electoral threshold, it would at least be desirable to do so from a minority rights perspective.

6.4 *Militant democracy, the electoral threshold, and human rights law: conclusion*

The foregoing legal analysis reveals again the cross-cutting nature of Kurdish claims, as the important claim to political participation via pro-Kurdish parties at the national level cuts across several human rights categories. Together, these human rights categories add a strong degree of normative force to claims for the reform of the electoral threshold and to the paranoid militant aspects of Turkey’s democracy.

Clearing these obstacles to Kurdish political participation in parliament engages all three dimensions of the internal right of self-determination, the individual right to political participation without discrimination, and the right of minorities to effective political participation. While the militant features of Turkey’s democracy examined in this chapter are

¹¹⁷ Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs* (2008), para. 82.

¹¹⁸ *Ibid*, paras. 16-17.

¹¹⁹ *Ibid*, para. 18.

¹²⁰ *Ibid*, para. 71.

plainly unlawful according to the jurisprudence of the ECtHR, none of the human rights standards considered here go so far as to unambiguously deny the legality of Turkey's electoral threshold. Nevertheless, a strong normative case can be made for the reform of the threshold based on the triumvirate of self-determination, non-discriminatory political participation rights, and minority rights. A reduction in Turkey's threshold (as repeatedly requested by the Parliamentary Assembly of the Council of Europe¹²¹) or even its complete abolition (as proposed by the pro-Kurdish HDP in its 2015 manifesto¹²²) is at least highly desirable from a human rights perspective.

Recent political developments in Turkey, however, reveal that although the high electoral threshold remains a serious obstacle to Kurdish political participation, it is not necessarily an insurmountable one. The HDP, the most recent pro-Kurdish party, successfully broke through the electoral threshold in the elections of June 2015, November 2015, and June 2018. Its share of the national vote was 13.1%, 10.8%, and 11.7% respectively. At the time of writing, the HDP is Turkey's second-largest opposition party in terms of parliamentary seats and Turkey's third-largest party overall. To summarise a complex story, the HDP achieved these results by reaching out to three important voter groups, namely conservative Kurdish voters who usually voted for the AKP, ethnic Kurds from Turkey's major cities such as Istanbul, Izmir and Ankara who usually voted for Turkey's mainstream parties, and secular-liberal Turkish citizens of non-Kurdish descent.¹²³ In large part, the HDP achieved this by positioning itself as a radical democratic "party of Turkey" rather than a party with purely Kurdish concerns.¹²⁴ Although previous pro-Kurdish parties had tried to position themselves in a similar way¹²⁵, none were able to achieve such resounding success. It cannot, however, be taken for granted that this success will extend far into the future.

Political participation at the national level is only one aspect of the Kurdish Question in Turkey and is not, on its own, sufficient to resolve it. As noted above, aside from being a valuable

¹²¹ See Council of Europe Parliamentary Assembly Resolution 2121 (2016), *The functioning of democratic institutions in Turkey*, para. 2.

¹²² Anadolu Agency, *Turkey's Kurdish party reveals election manifesto* (21 April 2015)

<<https://www.aa.com.tr/en/turkey/turkeys-kurdish-party-reveals-election-manifesto/55261>> accessed 21/09/18.

¹²³ Ioannis Grigoriadis, 'The Peoples' Democratic Party (HDP) and the 2015 elections', 17 *Turkish Studies* (2016), 42.

¹²⁴ Ödül Celep, 'The moderation of Turkey's Kurdish left: the Peoples' Democratic Party (HDP)', 19 *Turkish Studies* (2018), 729.

¹²⁵ For example, HEP was originally conceived as a party "for all Turkey" dedicated to a "fight for democracy". See Nicole Watts, *supra* n. 7, 64-65.

mechanism of Kurdish self-determination *in its own right*, the presence of a Kurdish Question oriented party in parliament is also an important mechanism for articulating and negotiating “thicker” forms of self-determination, such as territorial autonomy. It is to that issue that the next chapter turns.

CHAPTER SEVEN

7 Political Participation II: Territorial Autonomy

The previous chapter focused on political participation at the national level through typically liberal-democratic representative institutions such as the Turkish Grand National Assembly. Participation at the national level, it was argued, is necessary both as part of the process towards negotiating and debating a more far-reaching answer to the Kurdish Question *and* as an ongoing part of the overall solution. But while participation at the national level is certainly a *necessary* response to the Kurdish Question, it is not a *sufficient* response. Democracy in the liberal-democratic sense usually takes abstract individuals in positions of abstract equality as its reference point, and views the state as a neutral guarantor of human rights and a neutral arbiter or locus of political contestation.¹ But this particular form of democracy, for all its undoubted merits, gives rise to certain pathologies which can be destructive of minority cultures and languages. The basic equality principle of one person one vote, for example, can facilitate the disempowerment of ethno-cultural minorities who are easily outvoted by the majority. This is particularly problematic when representatives of the majority seek to forge a national identity that smothers cultural and linguistic differences, as has historically been the case in Turkey. The limits of national participation in a broadly liberal-democratic political system are well summarized by Nimni:

“In the present state of affairs, liberal democracy in the best scenario, invites minorities to assimilate to the majority with democracy as compensation, something that often national minorities are not prepared to accept”.²

Political participation under these circumstances can go hand-in-hand with the gradual destruction of minority groups’ very existence as cultural groups. What is needed is therefore a more meaningful (if supplemental) group-based form of political participation which mitigates these pathologies. In other words, we need some kind of *disaggregation of sovereignty*. In this section, I will argue that territorial autonomy is a necessary part of the

¹ The latter view is questionable. See Ralph Miliband, *The State in Capitalist Society* (The Merlin Press, 2009).

² Ephraim Nimni, ‘Liberal Nation States and the Antinomies of Minority Representation: The Impact on the Republic of Turkey’ in Ephraim Nimni & Elcin Aktoprak (eds.), *Democratic Representation in Plurinational States* (Springer 2019), 21.

answer to the Kurdish Question and I will seek to ground the claim to territorial autonomy in international law.

7.1 *Defining territorial autonomy*

The word “autonomy” derives from the Greek words *auto* (self) and *nomos* (law or rule).³ Broadly speaking, autonomy is “the right to be different and to be left alone; to preserve, protect, and promote values which are beyond the legitimate reach of the rest of society.”⁴ Autonomy is therefore a relational concept – it is about reorienting the relationship between a defined group or entity and the state. There are myriad ways in which a group can rule itself to a greater or lesser degree; for example, Chapter Five on mother tongue education referred to forms of non-territorial autonomy, specifically the possibility of Kurds as a group having the right to manage their own schools across Turkey. But what differentiates territorial autonomy from other forms of self-rule?

Perhaps the most sustained attempt to come up with an analytically useful definition comes from Suksi’s in-depth comparative constitutional study. For Suksi, territorial autonomy can be distinguished from other forms of autonomy and from federalism insofar as it involves the creation of a territorially based entity with exclusive law-making powers of an enumerated nature.⁵ To this one might add that the autonomous entity normally has no special representation at the national level, whereas federal states often have bicameral parliaments which contain representatives from federal regions.⁶ The fact that the powers of an autonomous territory are usually spelled-out in law while the central state retains all other powers differentiates it from a federal arrangement (where the powers of the state are usually enumerated and all other powers belong to federal entities).⁷ The fact that the powers are devolved to a *territorial* entity rather than, say, an ethnic group, differentiates it from non-

³ Ruth Lapidot, *Autonomy: Flexible Solutions to Ethnic Conflicts* (US Institute of Peace 1996), 29.

⁴ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination* (University of Pennsylvania Press 1990), 4.

⁵ Marku Suksi, *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer 2011), 624.

⁶ *Ibid.*, 106.

⁷ For example, the federal Iraqi constitution lists the exclusive powers of the federal government (Article 110) and leaves other powers with the regions (Article 115).

territorial forms of autonomy.⁸ And the fact that the autonomous territory has law-making powers differentiates it from forms of local administration and local government. Within this general definition there is room for all kinds of permutations, and some territorial autonomy arrangements will shade-off into federalism (such as the Spanish model, which will be discussed later). A state might contain only one autonomous territory or it might contain several; and the powers of autonomous territories can be more or less symmetrical. The specific design of the territorial autonomy arrangement depends on the instrumental goals it is intended to achieve and on the balance of forces contesting or supporting an existing state structure.

As well as structural differences, the devolution of law-making powers to a territorial entity can serve a number of different or overlapping functions. It might, for example, serve as a check and balance on governments or factions⁹; it might serve as a method of strengthening the power of capital over representative institutions¹⁰; it might serve, intentionally or not, to accelerate the extinction of traditional cultures¹¹; or it might serve to domesticate and tame radical movements for social change by channeling them into an acceptable institutional form.¹² This chapter is primarily concerned with territorial autonomy arrangements which are primarily designed to offset the pathologies of sovereign nation-building by allowing territorially concentrated ethnocultural groups to participate more effectively in a political sense (by exercising legislative and executive power at a local level where the state-wide minority forms a majority) and in a cultural sense (by enabling them to use that political power to pull policy levers which enable the group to better maintain and develop its own culture). But before turning to international law and the Kurdish Question, it is necessary to briefly consider some theories of territorial autonomy.

⁸ Also see Marku Suksi, 'Non-Territorial Autonomy: The Meaning of '(Non-) Territoriality'' in Tove Malloy & Francesco Palermo, *Minority Accommodation through Territorial and Non-Territorial Autonomy* (Oxford 2015).

⁹ This was the view of James Madison in *The Federalist Papers*.

¹⁰ Miliband noted that businesses might be in a position to play local governments off against each other and to more effectively dominate a smaller and less powerful government. Ralph Miliband, *The State in Capitalist Society* (The Merlin Press 2009), 171-178.

¹¹ Baubock notes that indigenous groups gaining political autonomy might come under pressure to transform "a broad variety of oral languages into standardized written idioms". Rainer Baubock, 'Territorial or cultural autonomy for national minorities?' (IWE Working Paper Series 2001), 5.

¹² Knox argues that this is precisely the *raison d'être* of the right of self-determination. Rob Knox, 'International Law, Self-Determination and Political Co-Option' in Ignasi Bernat & David Whyte (eds.), *Building a New Catalonia: Self-Determination and Emancipation* (Pollen Edicions 2019).

7.2 Theories of territorial autonomy

The concept of territorial autonomy can be approached from a variety of overlapping theoretical vantage points. The most relevant perspective for current purposes seeks to understand territorial autonomy as an institutional form that can aid the maintenance and development of minority cultures and languages. Kymlicka, for example, presents a compelling case for rethinking the liberal tradition and finding a place for group rights within it. He points out that *one person one vote* masks structural inequalities between majority and minority and that group rights can ameliorate this inequality.¹³ The accommodation of differences, he argues, “is the essence of true equality”.¹⁴ Justice therefore requires, in certain cases, the recognition of group rights in order to serve the instrumental purpose of rectifying unchosen inequalities and enabling minorities to enjoy their own culture in the same way as members of the majority¹⁵. For Kymlicka, the trend towards territorial autonomy arrangements in the West is one particular manifestation of group rights that has facilitated greater minority participation in political, economic, and cultural life.¹⁶ This line of argument builds on the work of theorists like Charles Taylor, who points to the discrimination and inhumanity built into a supposedly ‘difference-blind’ society (due to its tendency to suppress differences and minority identities) and calls for measures to “maintain and cherish distinctness” rather than pretending that it does not exist.¹⁷ In effect, by granting minority groups a territorial sphere of (at least partial) political control and a degree of separation from the majority ethnic group and the central government which it dominates, it is possible for them to use their own initiative to maintain and develop their culture and language. In Quebec, to cite another example, Francophone Canadians have been able to use the powers attached to their territorial autonomy arrangement in order to create a French *visage linguistique*, which has been useful in maintaining and developing their language and culture in the midst of a majority Anglophone Canada.

Other theories highlight the political aspirations of minority groups over and above the defence and maintenance of their cultures and languages. As Baubock puts it, “Rather than being

¹³ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1996).

¹⁴ *Ibid*, 108.

¹⁵ *Ibid*, 109-110.

¹⁶ Will Kymlicka, ‘Renner and the accommodation of sub-state nationalisms’ in Ephraim Nimni (ed.), *National-Cultural Autonomy and its Contemporary Critics* (Routledge 2004).

¹⁷ Charles Taylor, ‘The Politics of Recognition’ in Amy Gutmann (ed.), *Multiculturalism and the Politics of Recognition* (Princeton 1994), 40.

merely an instrument for preserving cultural difference, self-government is more often the real goal of national aspirations while cultural traditions and practices serve as markers to identify the members and as a resource for mobilizing them”.¹⁸ Territorial autonomy is sought for intrinsic purposes as well as instrumental purposes, which is to say that it is valued as a goal *in its own right* as well as a *means* of cultural preservation and development.¹⁹ Often, groups will seek territorial autonomy in order to restore historical political power that was extinguished through processes of state formation in which they had little say, and which may have been brought forward through severe acts of oppression against the minority. The goal here is essentially to obtain a fairer distribution of sovereignty, and for Baubock there is no *a priori* reason why self-government and sovereignty should be concentrated solely in the hands of sovereign states.²⁰

Finally, one can look at territorial autonomy through the lens of peace and security and post-conflict state building. This theoretical viewpoint does not necessarily deny the value of territorial autonomy as either an instrument for the maintenance and development of minority cultures or as an end-goal in itself, rather it emphasizes the ability of timely and well-constructed territorial autonomy arrangements to preserve states’ territorial integrity, to “keep the lid on the secession kettle”²¹ and either end or prevent intra-state conflict. Entire volumes have been dedicated to examining the ability of autonomy arrangements to achieve this goal, with generally positive conclusions.²² As noted in Chapter Four, it is part of the very essence of “hybrid self-determination”, as part of the *lex pacificatoria*, that sovereignty is redistributed, possibly in the form of territorial autonomy arrangements. Furthermore, this theoretical perspective emphasizes the value of territorial autonomy to the minority groups concerned, as well as to the wider community at large, in terms of security interests. McAuliffe, for example, argues that power sharing, which might include territorial autonomy, attempts to address the security concerns of weaker parties in peace settlements. These weaker parties are concerned about the ability of the other side to deploy the state’s coercive apparatus and to flex its superior

¹⁸ Rainer Baubock, *Why stay together? A pluralist approach to secession and federation* (Institute for Advanced Studies 1997), 28.

¹⁹ Rainer Baubock, *Territorial or cultural autonomy for national minorities?* (IWE Working Paper Series 2001).

²⁰ Rainer Baubock, *supra* n. 18, 26.

²¹ Marku Suksi, ‘Keeping the Lid on the Secession Kettle – a Review of Legal Interpretations Concerning Claims of Self-Determination by Minority Populations’, 12 *International Journal on Minority and Group Rights* (2005), 189.

²² See Marc Weller & Stephan Wolff (eds.), *Autonomy, Self-governance and Conflict Resolution: Innovative Approaches to institutional design in divided societies* (Routledge 2005).

political and economic muscle. As a result, they “seek degrees of political, economic, military or territorial power that either reduce the danger of one side reneging or provide them with some security in the event that this occurs.”²³ For McAuliffe, territorial autonomy is ultimately about addressing these security concerns and providing reassurance, rather than “linear, instrumental goal orientation”²⁴ What matters for the group is not only cultural preservation or political power for its own sake, but “existential concerns over group survival”.²⁵

All of these theoretical perspectives contribute something to our understanding of territorial autonomy, both in terms of why it ought to be provided and why particular groups might seek it. But since the right of self-determination is concerned with altering the relations between sub-state groups and the state at large in order to increase opportunities for political, economic, social and cultural participation, that must be the main normative focus of this section. This is not to claim that historical arguments or security arguments are irrelevant—far from it—rather that it tends to be the case that even if those arguments predominate over participatory arguments any eventual, well-designed and well-implemented territorial autonomy arrangement is likely to enhance participation as one of its core features. For example, if a group is likely to be violently repressed without a territorial autonomy arrangement then it is difficult to argue that they are participating effectively. And if elite representatives of a group seek to establish a territorial autonomy arrangement in order to oppress the group’s members, to establish a local dictatorship, or generally to make people less free then it is difficult to see why international human rights law ought to engage positively with such a claim.

Having outlined at the general level some theories of territorial autonomy, this section will now turn to a discussion of the specific contours of the Kurdish claim to territorial forms of autonomy before considering how it interfaces with international law. But first, it is necessary to briefly consider some obstacles, both legal and political, to the creation of a territorial autonomy arrangement in Turkey. The identification of these obstacles will help to justify the decision made in this chapter to propose the Spanish model of territorial autonomy as a broadly workable option for Turkey.

²³ Padraig McAuliffe, ‘Dividing the Spoils: The Impact of Power Sharing on Possibilities for Socioeconomic Transformation in Postconflict States’, 11 *International Journal of Transitional Justice* (2017), 203.

²⁴ *Ibid*, 213.

²⁵ Padraig McAuliffe, ‘The Post-Conflict Security Dilemma and the Incorporation of Ethno-Cultural Diversity’ in Gaetano Pentassuglia (ed.), *Ethno-Cultural Diversity and Human Rights* (Brill 2017), 367.

7.3 Legal and political obstacles to territorial autonomy in Turkey

Turkey is a highly centralised unitary state. Article 3 of its constitution entrenches (in an unamendable way) the country's indivisibility with its territory and nation. At first glance, a literal reading of this fundamental provision does not preclude the devolution of law-making powers to territorially autonomous entities which are, in theory, compatible with the state's territorial integrity. However, Turkey's Constitutional Court has adopted an exceptionally restrictive interpretation of territorial integrity which incorporates the state's unitary nature; and the same court defines a unitary state as one which does not permit federalism *or any kind of autonomy or self-rule for regions*. It is therefore unlawful for political parties to even advocate these structures.²⁶ The problem here is both the text of the constitution (which is authoritarian and tutelary²⁷) and the biases of the institution responsible for its interpretation (which is saturated in Jacobin ideology²⁸). This obviously presents an immediate and serious legal obstacle to the creation of a territorial autonomy arrangement in Turkey, which can only be overcome via the adoption of a more democratic constitution and possibly via some form of judicial power-sharing arrangement in order to curb the judiciary's Jacobin tendencies.²⁹ The right of pro-Kurdish political parties to advocate territorial autonomy under the European Convention on Human Rights was established in the previous chapter.

Besides the legal obstacles to territorial autonomy in Turkey, there are also myriad political obstacles. Most importantly, there is the familiar risk that what starts out as a territorial autonomy arrangement terminates in outright secession. Recent independence referenda in Catalonia, Scotland, and Iraqi Kurdistan—two of which (Catalonia and Iraqi Kurdistan) provided the basis for secession attempts and one of which (Scotland, in the context of Brexit) has a considerable chance of doing so in the near future—cannot but have left the impression that an autonomous Turkish Kurdistan will one day become part of a greater independent Kurdistan. As one ruling AK Party leader put it: “nobody [on the Kurdish side] wants partition.

²⁶ Ergun Ozbudun, ‘Party prohibition cases: different approaches by the Turkish constitutional court and the European Court of Human Rights’, 17 *Democratization* (2010), 128.

²⁷ Ergun Ozbudun, *The Constitutional System of Turkey: 1876 to the Present* (Palgrave Macmillan, 2011), 19.

²⁸ Odul Celep, ‘The Political Causes of Party Closures in Turkey’, 67 *Parliamentary Affairs* (2014), 388.

²⁹ Derya Bayir, ‘The Judiciary in Autonomy Arrangements: Lessons for the Kurdish Case’ in Ephraim Nimni & Elcin Aktoprak (eds.), *Democratic Representation in Plurinational States* (Palgrave Macmillan 2019).

But the west of Turkey hasn't realised this."³⁰ According to International Crisis Group, the Kurds' democratic autonomy proposals (discussed later) "have not convinced the Turkish authorities that is all they want".³¹ This problem is exacerbated by the fact that the political and security dynamics in the Middle East are not the same as those in the European Union. As Kymlicka argues, EU integration has eroded state borders and ensured that European states do not have neighbouring enemies. This, in turn, has desecuritized state-minority relations (as minorities are no longer seen as fifth columns for those enemies) and made territorial autonomy arrangements more agreeable.³² In contrast, the political and security climate in the Middle East is considerably less emollient, so granting territorial autonomy is more likely to be perceived as a weakening of the state *vis-à-vis* its opponents.³³

For these reasons and others, it might be the case that full territorial autonomy is more of a long-term goal for the Kurds in Turkey, and the immediate focus in any eventual negotiations will be on the kind of cultural rights (secured at the individual and group levels) and national-level political participation mentioned in previous chapters, perhaps alongside the strengthening of local administrations without law-making powers. But the fact that territorial autonomy *is a goal* is undeniable. It has been a constant feature of pro-Kurdish parties' political programs³⁴ (for example a former co-chair of the most recent pro-Kurdish party has referred approvingly to the Spanish model as a possible form of government)³⁵ and available studies indicate that a majority of Kurds in Turkey's southeast want either federalism or autonomy, while only a small minority seek full independence.³⁶ In order to resolve the tension between the state (which demands centralization) and the Kurdish periphery (which demands decentralization) it is necessary, for prudential reasons, to seek the most achievable middle-ground between the two opposing sides. This is arguably what the PKK and associated

³⁰ International Crisis Group, *Turkey: Ending the PKK Insurgency* (Europe Report No. 213, 2011), 24. Cagaptay states that a majority of the Turkish population would object to the creation of an autonomous Kurdish region: Soner Cagaptay, *The New Sultan: Erdogan and the Crisis of Modern Turkey* (I.B. Tauris 2017), 153-154.

³¹ *Ibid.*, 23.

³² Will Kymlicka, *supra* n. 16, 144-145.

³³ This is the view of a Turkish international lawyer cited by Barkey and Fuller. Henri Barkey & Graham Fuller, *Turkey's Kurdish Question* (Rowman & Littlefield 1998), 202.

³⁴ Cengiz Gunes, 'Unpacking the 'Democratic Confederation' and 'Democratic Autonomy' Proposals of Turkey's Kurdish Movement' in Olgun Akbulut & Elcin Aktoprak (eds.), *Autonomy as a Model for Minority Self Government: From Theory to European and Middle Eastern Perspectives* (Brill 2019).

³⁵ Selahattin Demirtas, 'The Middle East, the Kurdish Peace Process in Turkey, and Radical Democracy', 13 *Turkish Policy Quarterly* (2015), 32.

³⁶ Henri Barkey & Graham Fuller, *supra* n. 33, 204.

organisations seek to do, without giving up on the revolutionary potential of the Kurdish Question.

7.4 *The Kurdish claim: Democratic Confederalism*

As previously mentioned, the PKK was originally a Marxist-Leninist organisation which sought the creation of an independent Kurdistan.³⁷ But its demand for external self-determination was dropped in 1995 as its leader, Abdullah Öcalan, began to theorise an alternative route to Kurdish self-determination.³⁸ Over time, from his prison cell on Imrali Island, Öcalan penned several documents elaborating upon his paradigm of ‘democratic confederalism’ which, according to Jongerden, shifts the focus away from external self-determination and instead emphasizes “the right of people to make decisions, to take responsibility for the organization and regulation of their social, economic, political and cultural affairs (democratic autonomy), and a bottom-up, council democracy for its administration (democratic confederalism).”³⁹ According to Matthews and Miley, democratic confederalism “redefines self-determination as direct democracy against the state” while emphasizing gender emancipation, environmental sustainability, and cultural and religious accommodation via a “revolutionary consociational system.”⁴⁰ There is much here to unpack and limited space in which to do it, so the following is a broad sketch of the democratic confederalism proposal.

In his writings, Öcalan draws some important conceptual distinctions. The first distinction is between republics and nation-states. Whereas republics are related to democracy and “[suggest] an administration that represents all members of the public...”, nation-states are “based on the analogy between state and nation... It denies the existence of different interest

³⁷ Aliza Marcus, *Blood and Belief: the PKK and the Kurdish Fight for Independence* (NYU 2007).

³⁸ Derya Bayir, ‘Turkey, the Kurds, and the legal contours of the right of self-determination’, 1 *Kurdish Studies* (2013), 9.

³⁹ Joost Jongerden, ‘The Kurdistan Workers’ Party (PKK): Radical Democracy and the Right to Self-Determination Beyond the Nation-State’ in Gareth Stansfield & Mohammed Shareef, *The Kurdish Question Revisited* (Hurst 2017), 254.

⁴⁰ Dylan Matthews & Thomas Jeffrey Miley, ‘Review of Abdullah Öcalan’s *Manifesto for a Democratic Civilization*’ in Thomas Jeffrey Miley & Frederico Venturini (eds.) *Your Freedom and Mine: Abdullah Öcalan and the Kurdish Question in Erdogan’s Turkey*, (Black Rose Books 2018).

groups within a nation as well as their rights and freedoms.”⁴¹ Nation-states are further distinguished from the “democratic nation”. The former “requires homogeneity of citizens with a single language and single ethnicity” while the latter “is multilingual, multireligious, multiethnic, and multicultural...”⁴² For Öcalan, the Kurdish Question can be resolved within a republic but not within a nation-state⁴³ and a democratic republic requires adherence to the democratic nation concept.⁴⁴ Öcalan argues that a democratic republic of the kind he has in mind can be achieved via a number of organizational principles under the umbrella concept of *democratic confederalism*, which would radically transform social, class, gender, and economic relations. In his *Principles of Democratic Confederalism* he describes it as a model of “grassroots participation” where substantive decisions are made by people directly at local levels. A federative principle allows for cooperation between communities, where delegates are sent to higher level assemblies.⁴⁵ Crucially, democratic confederalism does not change Turkey’s borders or its existing institutions⁴⁶, rather it attempts to coexist in tension with the state. Moreover, the plan is to expand the model beyond Turkey’s borders. In revolutionary terms, Öcalan writes about ending private property and an economy run along communal and ecological lines, “not aimed at achieving profits but at responding to the fundamental needs of the society and protecting the environment.”⁴⁷

To some extent, Öcalan’s ideas have been put into practice in northern Syria (Rojava) where the evacuation of the Assad regime left a space for revolutionary experimentation. Observers of Rojava have noted that it incorporates a council system in which there are four levels of political participation which run from the bottom up. First there is the *commune* which consists of villages or neighbourhoods. Second there is the *district* which consists of delegates from communes. Third there are *regional councils*; and fourth there is a *People’s Council of West Kurdistan*.⁴⁸ These levels of political participation are surrounded by a complex of other civil

⁴¹ Abdullah Öcalan, *Prison Writings III: The Road Map to Negotiations*, (International Initiative 2012), 20.

⁴² *Ibid*, 21-22.

⁴³ *Ibid*, 20.

⁴⁴ *Ibid*, 28-29.

⁴⁵ Abdullah Öcalan, ‘Democratic Confederalism’ in *The Political Thought of Abdullah Öcalan: Kurdistan, Woman’s Revolution and Democratic Confederalism* (Pluto 2017), 46.

⁴⁶ Abdullah Öcalan, *supra* n. 41, 93.

⁴⁷ *Ibid*, 96.

⁴⁸ Thomas Schmidinger, *Rojava: Revolution, War, and the Future of Syria’s Kurds* (Pluto 2018) 134.

society associations⁴⁹ and by direct assemblies of various constituent groups.⁵⁰ Democratic confederalism is therefore distinguishable from standard models of territorial autonomy. Rather than disaggregating sovereignty to a sub-state but state-like regional entity it seeks to overcome state structures by empowering people directly. But can democratic confederalism coexist with standard models of territorial autonomy?

7.4.1 *Democratic confederalism's relationship with territorial autonomy*

Pronouncements by key figures in the PKK and its associated organisations (such as the HDP) present a confusing and, at least on its face, a contradictory picture of the compatibility of democratic confederalism with standard models of territorial autonomy. Öcalan himself says on the one hand that “federalist solutions do not have the capacity to resolve problems... they continuously breed warfare and separatism.”⁵¹ Indeed, during his trial he stated that federalism and autonomy are “backward and sometimes even obstructive.”⁵² On the other hand, he also wrote that federalism can “play a positive role within the democratic nation solution and thus compensate for its own shortcomings.”⁵³ Another senior PKK figure, Cemil Bayik, opines that “there is no relation” between democratic confederalism and autonomy⁵⁴ whereas a former co-chair of the HDP writes about the Spanish model of territorial autonomy as if it is an example of democratic confederalism in practice.⁵⁵ Rojava is the only example to-date of democratic confederalism being partly put into practice, and yet some senior figures in Rojava, in the context of a difficult civil war, argue that “a federal system is [the] ideal form of governance for Syria”.⁵⁶

⁴⁹ Michael Knapp, Anja Flach & Erkan Ayboga, *Revolution in Rojava: Democratic Autonomy and Women's Liberation in Syrian Kurdistan* (Pluto 2016), ch. 7.

⁵⁰ Thomas Jeffrey Miley, ‘The Perils and Promises of Self-Determination: From Kurdistan to Catalonia’ in Thomas Jeffrey Miley & Frederico Venturini, *Your Freedom and Mine: Abdullah Öcalan and the Kurdish Question in Erdogan's Turkey* (Black Rose Books 2018), 366.

⁵¹ Abdullah Öcalan, *supra* n. 41, 94.

⁵² Michael Gunter, *The Kurds Ascending: The Evolving Solution to the Kurdish Problem in Iraq and Turkey* (Palgrave Macmillan 2008), 68.

⁵³ Abdullah Öcalan, *supra* n. 41, 89.

⁵⁴ Joost Jongerden, ‘Colonialism, Self-Determination and Independence: the New PKK Paradigm’ in Michael Gunter (ed.), *Kurdish Issues: Essays in Honour of Robert W. Olson* (Mazda 2016), 115.

⁵⁵ Selahattin Demirtas, *supra* n. 35, 32.

⁵⁶ These are the words of Hediye Yusuf, co-chair of the Constituent Assembly of the Rojava Democratic Federal System in Syrian Kurdistan. EKurd Daily, *We will not allow the division of Syria, Kurdish official says*, (13 July 2016) <<https://ekurd.net/kurdish-not-allow-syria-division-2016-07-13>> accessed 12/07/19.

Perhaps the best way to understand the place of territorial autonomy in the grand scheme of democratic confederalism is as a valuable tactical move in a broader strategy. Indeed, there is nothing necessarily contradictory about highlighting the limits of territorial autonomy *and* highlighting its ability to play a positive role if it can help to better facilitate democratic confederalism. Since, in Ocalan's words, democratic confederalism could coexist with the state (albeit in tension with it), there is good reason to believe that it could coexist more easily or productively with a standard form of territorial autonomy. On its own, territorial autonomy might be viewed as a partial or even an unsuitable solution; but when incorporated into a struggle for democratic confederalism, it may be a valuable arrangement for several reasons. First, it would involve the creation of an empowered administration at the local level which is more likely to take measures to support efforts to establish democratic confederalism; and second, if the more radical proposals fail then there is at least something valuable to fall back on.

7.5 Territorial autonomy and the right of self-determination

Territorial autonomy arrangements can be linked to international law in a number of ways. Perhaps most obviously, autonomy might be guaranteed under a bilateral or a multilateral treaty (as would have been the case for Turkey's Kurds under the Treaty of Sevres); or it might be created pursuant to a recommendation of an international organisation such as the UN Security Council.⁵⁷ But in the absence of a binding treaty or a recommendation from an authoritative international organisation, to what extent can the Kurdish claim to territorial autonomy be rooted in international law?

One way of approaching this question is to argue for a primary or remedial *right* to territorial autonomy pursuant to the right of self-determination. Typically, this approach involves identifying a group as a "people" and collecting evidence in an attempt to show that the right of self-determination entails a right to territorial autonomy. But even though international law has a long history and practice of engaging with territorial autonomy as a tool for dealing with

⁵⁷ Yoren Dinstein, 'Autonomy Regimes and International Law', 56 *Villanova Law Review* (2011).

nationalism⁵⁸, there is little to suggest that this piecemeal practice has been elevated to the level of a right.⁵⁹ As the Council of Europe Venice Commission pointed out in 1996, even states that have created territorial autonomy regimes are reluctant to accept a binding legal obligation to do so.⁶⁰ Nevertheless, postulating a clear and direct right of defined peoples to territorial autonomy is only one way of grounding such claims in international law. As explained in Chapter Four, the right of self-determination has the capacity to *legitimise* such a claim. Two linked aspects of the right of self-determination are engaged in this claim, namely its role in *facilitating participation* politically, culturally, socially and economically; and its *remedial function* in offsetting the pathologies arising from the way in which international law allocates sovereignty around the globe.

7.5.1 *The participatory argument*

In its participatory dimension, the right of self-determination has the capacity to legitimise claims which aim to allow minority groups to participate more fully in political, cultural, social and economic life. Given the in-built tendency of majoritarian democracy to marginalize Kurdish voices (even in the absence of the legal obstructions mentioned in Chapter Six) a territorial autonomy arrangement will give them the opportunity to make their own political and legislative choices over a given span of territory. Territorial autonomy would, in other words, turn the Kurds into a local political majority. This tendency to increase *political* participation overlaps very significantly with the right of minorities to effective political participation and will be considered in more detail in the next subsection on minority rights.

As well as enabling Turkey's Kurds to more effectively participate on the political plane, a territorial arrangement would enable them to more effectively maintain and develop their culture and their language. As noted in Chapter Five, the Basque Region of Spain exemplifies

⁵⁸ Nathaniel Berman, "But the Alternative is Despair": European Nationalism and the Modernist Renewal of International Law', 106 *Harvard Law Review* (1993), 1792.

⁵⁹ There is a considerable volume of scholarship on this question: N. Ho Tu Nam & Y. Fessha, 'Revisiting the Place and Use of Territorial Autonomy under International Law', 25 *International Journal on Minority and Group Rights* (2018), p. 530; Hurst Hannum, 'Territorial Autonomy: Permanent Solution or Step Toward Secession?' in Zelim Skurbaty, *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Martinus Nijhoff 2005), 153.

⁶⁰ Council of Europe Venice Commission, *Opinion on the Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights Appended to Recommendation 1201 of the Parliamentary Assembly*, CDL-INF (96)4, pp. 4-5.

the striking ability of territorial autonomy arrangements to, for example, reverse the declining vitality of minority languages. In effect, the creation of a degree of separation between the territorially concentrated minority group and the rest of the state can provide the necessary space for a non-dominant minority culture and language to thrive. Again, this tendency to increase *cultural* participation overlaps very significantly with the right of minorities to maintain and develop their identities and to resist assimilation into the dominant culture and language.

7.5.2 *The remedial argument*

In its remedial dimension, the internal right of self-determination serves to mitigate the pathologies arising from how international law allocates sovereignty around the globe. In Turkey, those pathologies tend to arise from the ongoing attempt to forge a monist nation-state out of what was a multiethnic and multilingual Ottoman Empire. As the historical explorations in previous chapters have shown, negative pathologies have arisen along a number of axes, including the political and the cultural. In political terms, as well as the typical marginalisation which arises from majoritarian democracy, political parties with a broadly pro-Kurdish emphasis have been repeatedly excluded from parliament and their legitimate attempts to articulate demands have been declared unlawful. In cultural terms, Chapter Five focused on language as an aspect of Kurdish culture which has been deliberately excluded from important domains of use such as education, with the explicit purpose of forging a single nation harnessed to the dominant Turkish *ethnie*.

An appropriate remedy to these pathologies requires not only the guarantee of equal individual rights in Turkey or the guarantee of non-territorial autonomy and control over Kurdish language education. It also requires the *disaggregation of Turkey's sovereignty* internally so that the Kurds can take charge of at least some of their own affairs. Given the historical background traced in the chapters of this thesis and the ongoing political, cultural, social and economic marginalisation of Turkey's Kurds, the right of self-determination offers strong normative support to the Kurdish claim for territorial autonomy. Such an arrangement would, in essence, mitigate the negative pathologies arising from Turkey's nation-building project by enabling the Kurds to exercise a degree of political, cultural, social and economic control.

7.6 Territorial autonomy and minority rights

In order to meet the criteria of *effective* Kurdish participation in public life, it may be helpful to ameliorate the effects of Turkey's majoritarian democracy by introducing a group-based territorial autonomy arrangement. Moreover, in order for Turkey's Kurds to effectively integrate into the state whilst maintaining and developing their culture, language and overall identity, it may be helpful to introduce a territorial autonomy arrangement.

It was noted in the previous chapter that Article 27 entails a right of persons belonging to minorities to participate effectively in, *inter alia*, public life.⁶¹ At the same time, Article 27 protects the right of individual members of minority groups to maintain and develop their own identities. The notion that territorial autonomy arrangements can significantly enhance the ability of individual members of minority groups to participate effectively and to maintain their own cultures, languages and traditions has been noted in the UN's quasi-judicial fora, by UN working groups, by regional advisory committees, by expert groups, and by scholars. In a concurring individual opinion in *Diergaardt et al. v. Namibia*, Martin Scheinin noted the links between Article 25 (the general right to political participation) and Article 1 ICCPR and argued that in some situations, Article 25 might require "special arrangements" beyond the individual right to vote and be elected. In particular, Scheinin noted that "Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of *effective* rights of participation".⁶² The UN Working Group on Minorities notes in its *Commentary to the UN Declaration on Minority Rights* that the duty to ensure the effective participation of minorities as well as the duty to protect the identity of minorities "might in some cases be best implemented by arrangements for autonomy... The autonomy can be territorial, cultural and local, and can be more or less extensive".⁶³ From a regional perspective, the Council of Europe's Advisory Committee on the FCNM notes that while there is no right to territorial autonomy derivative from the Framework Convention, such arrangements "can foster a more

⁶¹ UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art. 2(3).

⁶² UNHRC, *Diergaardt et al. v. Namibia*, Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000).

⁶³ UN Economic and Social Council, *Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/AC.5/2005/2, para. 20.

effective participation of persons belonging to national minorities in various areas of life”.⁶⁴ In the OSCE’s *Lund Recommendations*, which were drawn-up by a group of experts in the field of minority rights, it is noted that “Effective participation of minorities in public life may call for non-territorial or territorial arrangements or self-governance or a combination thereof...”⁶⁵ From a scholarly perspective, Ghai has argued that “in order to ensure effective participation, it is necessary that special procedures, institutions and arrangements be established through which members of minorities are able to make decisions, exercise legislative and administrative powers, and develop their cultures”.⁶⁶

In effect, these opinions demonstrate that the individual right to effective participation in public affairs and to the maintenance and development of one’s culture, combined with the right of self-determination in several of its internal dimensions, offers strong normative support to the Kurdish claim for territorial autonomy. This is the case even though there is no unambiguous *right* to territorial autonomy under international law.

The following subsection will consider how the Kurdish claim to territorial autonomy might work in practice by analysing Spain’s system of regional autonomy. As in chapter five, it is necessary to write a few words in justification of this choice of comparator. First, exigencies of space once again dictate that a fuller analysis of multiple territorial autonomy models is not feasible. This is something that might be considered in future work, and it might be tentatively suggested that the UK’s devolution model would be a valuable model—mainly because of the country’s strongly unitary modern history and its need to grapple with various nationalisms of different characters. The cantonal model in Switzerland would also be worth considering. Second, the history of Spain’s development from a monist unitary state into a multiethnic state with multiple different territorial autonomy regimes—which was set against the backdrop of considerable ethnic violence—gives it some core characteristics similar to modern Turkey. At a purely anecdotal level, this author has observed HDP politicians in Turkey advocating the Basque model of territorial autonomy for similar reasons. Dedicating the limited available

⁶⁴ Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, *Commentary on the Effective Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and in Public Affairs*, ACFC/31DOC(2008)001, paras. 133-134.

⁶⁵ OSCE, *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note*, September 1999, para. 14.

⁶⁶ Yash Ghai, *Public Participation and Minorities* (Minority Rights Group International 2001), 5.

space to an analysis of the Spanish model of territorial autonomy is therefore the most fruitful avenue of exploration.

7.7 *Possible model of accommodation: Spain*

There are many territorial autonomy arrangements throughout the world; particularly in Western democracies, it is common to find these arrangements in place for territorially concentrated minority groups. As Kymlicka points out, multicultural approaches to sub-state nationalisms—which typically combine territorial autonomy arrangements with other policies such as official language recognition—are now the norm. Indeed, “All groups over 250,000 that have demonstrated a desire for territorial autonomy now have it in the West...”.⁶⁷ Obviously, these arrangements are different from each other because they are the products of different historical conjunctures and operate in different political, social, economic and cultural contexts. However, despite the particularity of these arrangements, it is possible to extract from existing models of territorial autonomy some broad outlines of a future arrangement in Turkey. In this sub-section, I will argue that Spain’s quasi-federal model contains several valuable insights for a future answer to Turkey’s Kurdish question.

Spain is constitutionally an “indivisible homeland of all Spaniards” which is based on the “indissoluble unity of the Spanish Nation” (Section 2 of the constitution). Sovereignty is vested in the Spanish people as a whole (Section 1). In its interpretation of sections 1 and 2, the Constitutional Court has established that “the Constitution knows of no other nation than Spain”⁶⁸ and “only the Spanish people are sovereign, exclusively and indivisibly, no other subject or State body or any part of the people can be endowed with sovereign status by a public power”.⁶⁹

In simple terms, Spain, like Turkey, *appears to be* a monist state. But while it adopts much of the regalia of monism, Spain’s constitutional order also paves the way for the disaggregation

⁶⁷ Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (OUP 2007), 68-71.

⁶⁸ See Lucia Payero-Lopez, ‘A Nation-State or a Multinational State? National Conceptions, Minorities and Self-Determination in Spain’ in Ephraim Nimni & Elcin Aktoprak (eds.), *Democratic Representation in Plurinational States: The Kurds in Turkey* (Palgrave Macmillan 2018), 116.

⁶⁹ Spanish Constitutional Court, Judgment 42/2014.

of sovereignty to various nationalities and regions in the form of territorial autonomy. Section 2 of the constitution recognises “the right to self-government of the nationalities and regions of which [Spain] is composed” and Part VIII sets out a legal framework within which Self-Governing Communities can be created. The constitution itself does not name these Self-Governing Communities, nor does it constitute specific powers belonging to them, instead the process of creating *statutes of autonomy* was left for later negotiations. The statutes of autonomy are classed as “organic laws” which are hierarchically superior to ordinary legislation and below only the Spanish constitution, but they have a firm grounding in the text of the latter.⁷⁰ The first such statutes were enacted in 1979 and applied to Catalonia and the Basque region. By 1983, Spain contained a total of 17 autonomous communities across its European territory. Each one possesses by law a parliament, a council, a president, and an administrative corp. Some of their functions are held exclusively; others are shared with the central government.⁷¹

Spain’s constitution did not, therefore, impose any particular model of territorial autonomy or federalism; neither did it explicitly establish the territorial units to which autonomy would apply (although the constitution does refer obliquely to Catalonia and the Basque Region in Article 143). This was a result of the inability of its key participants to reach an agreement on the particular form that it should take and the need to forge a broad consensus.⁷² Other, similar models of territorial autonomy take a slightly different approach. For example, Italy’s constitution establishes “special forms and conditions of autonomy” for five named regions including the culturally and linguistically heterogeneous South Tyrol (Article 116), thus entrenching the asymmetrical devolution of powers to those regions. But it too provides for the post-constitutional creation of special statutes of autonomy which function, in effect, as regional constitutions.⁷³ In Italy as well as in Spain the process of devolution has occurred gradually and unevenly but in Spain, which does not constitutionally entrench asymmetry

⁷⁰ Gemma Sala, ‘Federalism without adjectives in Spain’, 44 *Publius: The Journal of Federalism* (2013), 118.

⁷¹ Robert Agranoff & Juan Antonio Ramos Gallarín, ‘Toward Federal Democracy in Spain: An Examination of Intergovernmental Relations’, 27 *Publius: The Journal of Federalism* (1997), 3.

⁷² See Enric Martínez-Herrera & Thomas Jeffrey Miley, ‘The constitution and the politics of national identity in Spain’, 16 *Nations and Nationalism* (2010), 6.

⁷³ See Francesco Palermo, ‘Italy: A Federal Country Without Federalism?’ in Michael Burgess & Alan Tarr, *Constitutional Dynamics in Federal Systems* (McGill-Queen’s University Press 2012).

between territories containing national minorities and other territories, there has been a marked tendency towards levelling-out (or rendering symmetrical) the powers of the 17 regions.⁷⁴

The Spanish system may be described as *quasi-federal* because it mixes typical properties of federalism and autonomy. On the federal side of the ledger, it applies to the entire territory of the country (whereas autonomy usually applies only to regions containing ethnocultural minorities⁷⁵); it provides for national and regional legislative powers which are constitutionally separate and both derived from the constitution⁷⁶; the statutes of autonomy created by the nationalities (including Catalans and Basque) have the character of a historic agreement between the central parliament and the community⁷⁷; there is some limited territorial representation at the national level via the Senate; and the national parliament does not have the legal power to override regional legislation which has been passed *intra vires*. On the autonomy side of the ledger, the constitution does not recognise any nation other than the Spanish nation, which precludes at the symbolic level a typically federal coming together of separate nations; its autonomous regions have no special say in the process of amending the constitution; and residual powers reside with the state rather than the autonomous regions.

There are several reasons why this Spanish quasi-federal arrangement is a valuable model for Turkey. Primarily, the decision to devolve power to 17 regions covering the entirety of Spain (commonly referred to as the *coffee for everyone* model) was designed to “[diminish], in a relative sense, the potential impact of Basque and Catalan autonomy.”⁷⁸ The fact that the Basque and Catalan regions are part of a pastiche of 17 regions makes the pill of territorial decentralisation easier for those with Jacobin centralizing tendencies to swallow. Spain’s constitution represents a historical synthesis of two dialectically opposed positions, namely “the unitarian organicism of most Spanish elites, and the republican federalist tradition...”⁷⁹ In

⁷⁴ See Eduardo J. Ruiz Vieytez, ‘Asymmetry and (Dis)accommodation of Minority Nations in a Complex Constitutional Framework: Catalonia, the Basque Country and other Autonomous Regions within the Spanish Kingdom’, 16 *European Yearbook of Minority Issues* (2019), 125. The Basque region does, however, stand out insofar as it has a measure of fiscal autonomy.

⁷⁵ Ruth Lapidoth, *supra* n. 3, 50.

⁷⁶ Luis Moreno, *Federalization in multinational Spain* (Unidad de Políticas Comparadas, Working Paper 07-04), available at: <<http://ipp.csic.es/sites/default/files/content/workpaper/2007/dt-0704.pdf>> (accessed 17/07/19).

⁷⁷ Eduardo J. Ruiz Vieytez, ‘Federalism, Subnational Constitutional Arrangements, and the Protection of Minorities in Spain’ in Alan Tarr, Robert F. Williams & Josef Marko (eds.), *Federalism, Subnational Constitutions, and Minority Rights* (Praeger 2004), 138.

⁷⁸ Danielle Conversi, ‘Autonomous Communities and the Ethnic Settlement in Spain’ in Yash Ghai, *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (CUP 2000), 126.

⁷⁹ *Ibid*, 123.

the words of one of the constitution's framers, it is "an authentic point of encounter between different conceptions of the Spanish nation... In it, two great notions of Spain merge."⁸⁰ The act of *merging* the Kurdish demand for territorial autonomy and the Turkish elites' monism is precisely what is needed in order to respond adequately to the Kurdish Question. Disaggregating Turkey's sovereignty in multiple territorial directions is likely to be more achievable than singling-out a majority Kurdish territory. The former can more easily be presented as an equitable arrangement for the benefit of all citizens of Turkey; the latter is too easily understood (rightly or wrongly) as a form of special treatment. In short, Turkey's Jacobin elites and the public are likely to find it easier to accept a generalized system of territorial autonomies across the land because it will (at least to some extent) smother any notion that the Kurds occupy a unique position as one of the founding nations of Turkey. By *universalizing* territorial autonomy, it is likely to be easier to obtain the ongoing consent of the population. At the same time as it would smother the notion of a unique status for Turkey's Kurds, the Spanish model would create a space for territorial autonomy to meet its instrumental goal of enabling ethnocultural groups to maintain and develop their cultures and languages. As detailed in the chapter on language rights, for example, the Basque language is going through something of a revival as a result of the ability of the Basque government and parliament to pull important policy levers. Moreover, the quasi-federal features of the Spanish model provide autonomous regions with a limited guarantee that their legislative programs will not be rolled-back by the state.

The most obvious drawback is that the Spanish model, with its tendency towards symmetry between its autonomous regions, arguably fails to recognise the unique historical and cultural reality of its national groups (including Catalans and Basque). It also tends to rely quite heavily on a politicised judiciary to police the boundaries of each territorial unit's competencies due, in part, to its lack of fora for reaching political compromises. On the other hand, one might argue that a failure to recognise the Kurds' unique position as one of the founding nations of Turkey is a relatively small price to pay if it helps to move Turkey into a post-centralised state era.

To sum up, the hybrid Spanish model - which transcends the dichotomies between unitary and federal states and between monism and pluralism – represents (at least in broad outline) the

⁸⁰ *Ibid*, 126.

most viable model solution for Turkey. It would add an important layer to Kurdish political participation at the national level by providing them with localized political institutions in which they form a majority. With that necessary degree of space and separation from the centre, Turkey's Kurds will be better able to design, legislate, and implement policies designed to maintain and develop their culture and their language. Additionally, political participation at the local level via territorial autonomy will provide an important check and balance on the power of the central government and parliament. Overall, the creation of a space within which Turkey's Kurds can exercise political and legislative power will allow them to integrate into the Turkish state on a footing of greater equality with the Turkish ethnic majority.

7.8 *Democratic confederalism and international law*

But as well as lending legitimacy to the claim for territorial autonomy, international law also shapes and disciplines it. This means that the powers exercised by any future autonomous region would need to respect human rights, and any policies aimed at the development of the Kurdish language and culture which require limiting the rights of non-Kurds would have to be necessary and proportionate to that aim in order to avoid falling foul of the right to non-discrimination. Furthermore, international law more broadly places severe restraints on revolutionary projects such as democratic confederalism, which is about overthrowing the globalized capitalist system as much as it is about pluralism. However much normative support for it one might be able to locate in the right of self-determination (indeed radical, bottom-up participatory democracy seems to be exactly what Susan Marks has in mind when she attempts to reorient the right of self-determination according to the principle of participation⁸¹) the fact is that it is through the day-to-day operation of international law (bilateral investment treaties, the law of international organisations such as the IMF and World Bank, global property rights and so on) that the globalized capitalist system functions.⁸² As Owen Taylor puts it, international law “structures the oppressive world against which revolutionaries pit themselves.”⁸³ Past attempts to use the legal form to restructure global capitalist relations and

⁸¹ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (OUP 2003), 112.

⁸² B.S. Chimni, ‘Prolegomena to a Class Approach to International Law’ 21 *European Journal of International Law* (2010), 57.

⁸³ Owen Taylor, *International Law and Revolution* (Routledge 2019), 7.

to secure a more inclusive international order, such as the *New International Economic Order* pursued by postcolonial states in the 1960s⁸⁴, ended in abject failure.⁸⁵

International human rights law grew together with a global neoliberal economic paradigm.⁸⁶ The latter has been progressive to the extent that it has been able to incorporate a limited politics of *recognition* even as it has severely undermined an egalitarian politics of *redistribution*.⁸⁷ Liberal multiculturalism of the kind discussed throughout this thesis has “diversified” and helped to legitimise a global economic system—run in part through supportive international (as well as domestic) institutions⁸⁸—that has led to extreme inequality.⁸⁹ Restoring the normalcy of the Turkish state via something akin to the Spanish model of territorial autonomy goes very much with the grain of modern international law, which is concerned with issues of *recognition*. If or when that has been achieved, establishing Democratic Confederation, which involves assaults on the right to private property and a major project of wealth *redistribution*, is more likely to involve a struggle *against* international law.

7.9 Territorial autonomy: conclusion

In conclusion, although it is not possible to locate a direct right to territorial autonomy in international human rights law (whether or not pursuant to the right of self-determination) it is nevertheless possible for international human rights law to legitimise or validate the Kurdish claim to territorial autonomy. The multidirectional disaggregation of sovereignty along Spanish lines (a form of internal self-determination) promises to offer the most meaningful way of securing Kurds’ right to participate effectively in public life, and the most effective way of enabling them to maintain and develop their language and culture. Relatedly, territorial autonomy is one important ingredient in an overall response aimed at remedying historical and ongoing wrongs done to the Kurdish people as a result of the way in which international law

⁸⁴ For details see Umut Özsu, “In the Interests of Mankind as a Whole”: Mohammed Bedjaoui’s New International Economic Order”, 6 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* (2015), 129.

⁸⁵ Adom Getachew, *Worldmaking after Empire: the Rise and Fall of Self-Determination* (Princeton 2019).

⁸⁶ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard 2018). Also see Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019).

⁸⁷ On recognition and redistribution see Nancy Fraser, ‘From redistribution to recognition? Dilemmas of justice in a post-socialist age’ 212 *New Left Review* (1995).

⁸⁸ Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard 2018).

⁸⁹ Nancy Fraser, *The Old is Dying and the New Cannot Be Born* (Verso 2019).

allocates sovereignty. Turkey's Kurds can therefore derive strong normative support for territorial autonomy from international human rights law. On the other hand, the revolutionary aspects of the Kurdish claim are as much about *redistribution* as *recognition*. The history of international law and critical studies of its present role in facilitating the capitalist mode of production indicate that implementing this model on a significant scale will involve a struggle against international law as well as a struggle against the state. Relying on international law will therefore only take Turkey's Kurds so far.

8 Conclusion

The question posed in the introduction to this thesis was: *how do the right of self-determination and related human rights standards engage with selected aspects of the Kurdish Question in Turkey?* Having established an account of the modern right of self-determination and its linkages with other individual human rights standards, and having considered two key aspects of the Kurdish Question in Turkey—namely mother tongue education and political participation nationally and locally—it is now possible to venture an answer to that question.

The right of self-determination does not entail a right to unilateral secession, whether of the primary right or the remedial right variety. Self-determination does, however, have ongoing relevance beyond the decolonisation context. In its internal dimensions, the right performs three interlocking functions. First, it legitimises minority claims to participatory arrangements. Second, it adds normative force to claims which are aimed at mitigating the adverse pathologies arising from how international law allocates sovereignty around the globe. And third, it obligates states to take legitimate minority claims seriously. Since its function is essentially to shape-up the process of state-minority negotiations and to *legitimise* certain claims, it does not grant *direct rights* to particular self-determination arrangements such as autonomy. This understanding of self-determination is informed by a broad but consistent reading of international human rights law, which is also concerned with the closely related rights of minorities. Minority rights differ from self-determination because they are *individual* rather than group rights. Minority rights do, however, require states to take action to maintain and develop minority identities—to ensure that minorities are not assimilated against their will—and this requires action at the group as well as the individual level. Both rights are informed by a substantive understanding of equality, since they are aimed at enabling minority groups to do something that majority groups take for granted, namely to maintain and develop their languages and cultures and to be secure in their identities.

In terms of Kurdish mother tongue education—which is one of the most important, if not *the* most important, aspect of the Kurdish Question in Turkey—the right of self-determination, the right to education on the basis of non-discrimination, minority rights, and the right of children to education all combine to add a strong degree of normative force to the Kurdish

claim. Insofar as self-determination is concerned, both the *participatory* and the *remedial* dimensions of internal self-determination are engaged because without access to mother tongue education Turkey's Kurds are unable to participate in cultural, political, economic and social life to anything like the extent of the dominant ethnically Turkish group. Moreover, the suppression of minority languages is one of the quintessential pathologies that tends to arise from nation-building projects. Mother tongue education—which is highly desirable from a human rights perspective—is best facilitated via group rights (rather than individual rights), and this might be done via a combination of territorial and non-territorial autonomy, given the fact that Turkey's Kurds are both territorially concentrated in the South-east and dispersed to other parts of Turkey.

In terms of Kurdish political participation at the national level, there are two major obstacles to overcome, namely Turkey's electoral threshold and the militant aspects of its democracy. These obstacles interface with the right of self-determination because representation in the national parliament via pro-Kurdish parties is an important channel for Kurdish political participation in the life of the state *and* an important channel for negotiations and discussions that could lead to a “thicker” measure of self-determination such as territorial autonomy. Some of the militant aspects of Turkey's democracy have been considered by the European Court of Human Rights, and binding judgments have been made which render them straightforwardly unlawful. The electoral threshold, on the other hand, falls within Turkey's margin of appreciation under the European Convention on Human Rights. A lowering of the threshold is, however, desirable from the perspective of the right of self-determination, equal rights to political participation, and the right of minorities to effective political participation.

Since political participation in majoritarian liberal-democratic institutions such as the Turkish national parliament are insufficient due to their inbuilt tendency to legitimise the assimilation of minority groups, it is necessary—in the particular case of Turkey's Kurds—to consider what international law has to say about *territorial autonomy* arrangements. Although there is no direct *right* to territorial autonomy pursuant to the right of self-determination, the right can at least legitimise claims to territorial autonomy where they are aimed at offsetting injustices and creating an institutional arrangement that will allow the minority group to more effectively participate in political, cultural, economic and social life. Such is the case for Turkey's Kurds. In essence, a territorial autonomy arrangement would establish a new locus of political decision-making in which the Kurds constitute an overall majority. This would

enable them to pull policy levers in order to maintain and develop their culture, their language and their identity. But since this is such a far-reaching claim, which entails a certain measure of executive and legislative power, it will be difficult to achieve in Turkey's particular circumstances. The most promising model is therefore the Spanish *coffee for everybody* model, which represents a meeting point between monist and pluralist conceptions of the state by disaggregating state sovereignty in multiple directions in order to smother claims to a unique national status by Catalans and Basques. Achieving a Kurdish autonomous region is likely to be more palatable to Turkey's elites and Turkey's population if it is but one autonomous community among many.

Overall, the right of self-determination and related human rights standards engage in myriad different ways with these two key aspects of the Kurdish claim. In some cases one can speak of unambiguous rights to particular outcomes (such as the relaxation of the militant aspects of Turkey's democracy) but in most cases it is better to speak in terms of the normative support (short of straightforward rights to particular outcomes) offered by international human rights law. The main point is that international human rights law *legitimises* or *validates* these legitimate Kurdish claims. In Bell's words, the right of self-determination ties peacemaking practice to the "normative universe" of international law.¹

Finally, it is necessary to consider the extent to which the analysis presented in this thesis provides generalisable lessons in terms of the right of self-determination and public international law more broadly, or whether it has been a *sui generis* object of study. On one hand, the experience of Turkey's Kurds is as unique as the experiences of the Palestinians, the Amazigh, and the Tamils. On the other hand, all of these communities share the experience of being minority communities inside nation-states that exist in a globalized world order, which tends to lead to broad similarities in patterns of oppression (it has been noted in this thesis, for example, that the suppression of minority languages has long been a common feature of nation-state building projects). Insofar as this thesis has theorised the relationship between these broadly similar patterns of oppression and international human rights law, it provides generalisable lessons. The arguments linking claims for mother tongue education and political participation to the normative universe of international human rights law can, *mutatis mutandis*, be deployed by other minority groups making similar claims. It is also

¹ Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (OUP 2008), 220.

submitted that the Kurdish experience illustrates the necessity of disaggregating internal self-determination—which is often understood purely in terms of *political* participation via parliamentary representation or territorial autonomy—into the myriad overlapping dimensions of group participation. Without seeking to undermine the salience of demands for stronger political participation, this thesis has shown that claims by minority groups also exist on the plane of cultural rights and that the right of self-determination has the capacity to legitimise such claims at the group level.

One might reasonably ask why all of this matters. Why should anybody care about what international human rights law *legitimises* or *validates*? I argue that human rights can be a useful “emancipatory tool”.² The ability to narrate the claims to mother tongue education and to political participation as being supported by international human rights law is an important part of the ideological armory of the Kurdish struggle for emancipation. As O’Connell puts it, rights “provide a language for critiquing and challenging the extant social order”³ and, moreover, they provide a language which has a lot of moral force. Rights talk is tactically useful to struggles by oppressed groups because of its “ability to galvanize constituents and third parties into action”; an ability that “hinges on the ethical pull they exert on those audiences”.⁴ In short, narrating the Kurdish claims presented in this thesis as consistent with international human rights law gives those claims moral (as well as legal) weight and, in so doing, can add to the strength of the Kurdish movement in Turkey. The extent to which the tools of international human rights law *actually are* deployed by relevant Kurdish and Turkish social and political actors is outside the scope of this thesis, but will be the subject of further empirical study in the future. The claim is not that the Kurdish Question can be resolved by international human rights law from the outside, rather the claim is that international human rights law forms an important part of the Kurdish political and social struggle. As O’Connell puts it, “the assertion of human rights will not bring about fundamental transformation in and of itself, but they can play an important role in broader struggles to do that”.⁵

² Paul O’Connell, ‘On the Human Rights Question’ *Human Rights Quarterly* (2018).

³ *Ibid.*

⁴ Clifford Bob, *Rights as Weapons: Instruments of Conflict, Tools of Power* (Princeton 2019), 11.

⁵ Paul O’Connell, *supra* n. 2.

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